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Is a vessel actually going astern at the time of collision liable for such collision merely because she failed to stop her engines until six minutes before the same, while the vessels were still about two miles apart?

No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian  
Steamship "Selja", on behalf of him-  
self and the owners, officers and crew  
of said steamship,

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP  
COMPANY, Claimant of the American  
Steamship "Beaver",

*Appellee.*

## BRIEF FOR APPELLANT.

**FILED**

FEB 13 1914

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*

Filed this.....day of February, 1914.

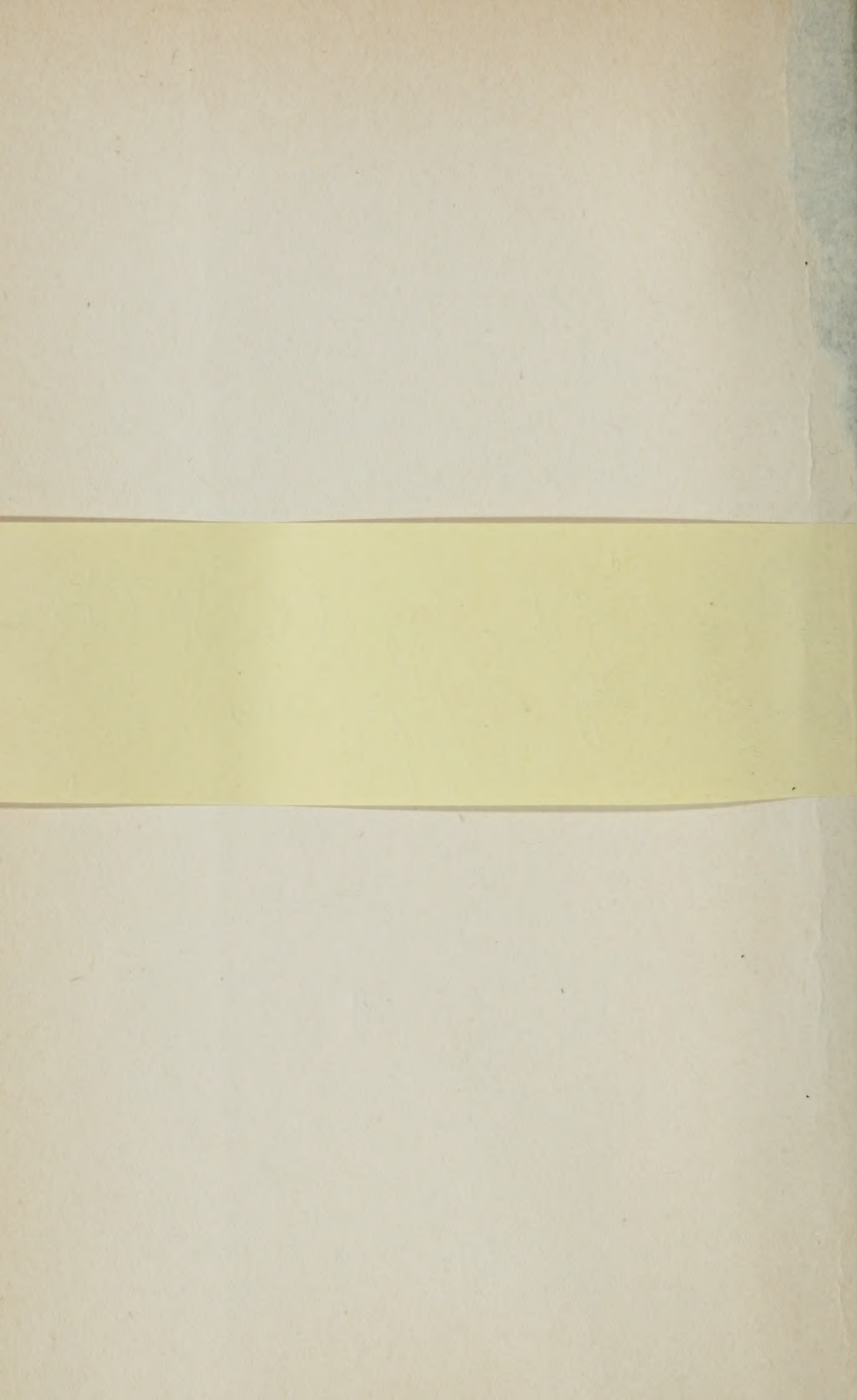
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## BRIEF FOR APPELLANT.

This is an appeal from a decree of the District Court of the Northern District of California. The original libel was brought by Olaf Lie, Master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of the "Selja", which was sunk in a collision with the steamship "Beaver" on November 22, 1910, near Point Reyes on the coast of California. An intervening libel was also filed by Captain Lie on behalf of the cargo of the "Selja", and a separate suit was

brought by the charterers of the "Selja" to recover their chartered freight. The three cases were consolidated for trial and referred to a Commissioner to take the evidence. After a lengthy hearing before the Commissioner the case was argued before the court and both vessels were held in fault. The cargo interest and later the freight interest were allowed a full recovery, and the libelant was also allowed a full recovery on behalf of the officers and crew of the "Selja" (no appeal being taken by either side from this part of the decree).

The interlocutory decree provided that the damages of the libelant individually and of the owner of the "Selja" should be apportioned with the damages suffered by the "Beaver" under the usual rule as to cross liabilities, and that libelant should recover the balance found due after such apportionment (IV, 1401-2).<sup>\*</sup> It also provided, following the rule of *The Chattahoochee*, 173 U. S. 540, that from these half damages should be deducted one-half of the damages suffered by the cargo and other interests (*Id.*). All the damages were later agreed to by stipulation. The cargo damages amounted to over \$260,000 (IV, 1404-6), while the damages suffered by Captain Lie and the owner of the "Selja" aggregated \$180,878.69 (IV, 1410, 1434-5). These damages are set out in full in the final decree (IV, 1434-5), and it is also adjudged that they should bear interest at 6% per annum from the date of the collision. As half of the cargo damages alone were considerably more than the

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<sup>\*</sup> Note:—Roman numerals indicate volume of Apostles on Appeal and numbers indicate the pages thereof.

half damages awarded to the libelant, the result was that the master and owner of the "Selja" recovered *nothing at all*, and the final decree so provides (IV, 1435). The appeal is taken from this portion of the decree and also from the further provision that the costs be divided. If the lower court was correct in holding both vessels in fault, the decree is also correct. If, however, the "Selja" was not in fault, or if its fault is held not to have contributed to the collision, the libelant should have an award for the full damages suffered, with interest as aforesaid and also his costs.

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### Statement of Facts.

*As to the "Selja":*

On November 22, 1910, at about the hour of 3:16 P. M., off Point Reyes in a dense fog, the Norwegian steamship "Selja" was run into and sunk by the American steamer "Beaver". Providentially, but two lives were lost.

The "Selja", in command of Captain Olaf Lie, was a modern tramp steamer 380 feet long with a displacement fully loaded of 10,275 tons on a mean draft of 23 feet 6 inches (Lie, I, 151). She left Yokohama, Japan, on the 2nd day of November, 1910, bound for San Francisco (Id. 150). The last observation taken by her master while on the Great Circle course was at 10:10 P. M. on November 21st, and showed the steamer to be 98 miles from Point Reyes (Id. 152). At 11 P. M. of that night her course was changed to S. 70° E. Magnetic, and she continued on this course until 8 A. M. November

22nd (Id.). At 1 A. M. of the same night the "Selja" encountered fog, though otherwise the weather was fine and the sea was calm with a long, rolling swell (Id. 153). This condition of sea and weather continued up to the time of the collision. When the "Selja" entered the fog at 1 A. M., November 22nd, the third officer then on watch called the master to the bridge, where he remained practically continuously, directing the ship's navigation, until the collision. From 1 A. M. the "Selja's" whistle was continuously blown at intervals of about a minute (Id. 153). At about 2 A. M. three blasts from the fog horn of a sailing vessel were heard about three points on the "Selja's" starboard bow, and, as the light wind then blowing was westerly, this signal told the master of the "Selja" that the sailing ship was practically on his course with the wind abaft her beam. Under these circumstances, the "Selja" proceeded on her course and, after hearing four or five further blasts from the ship's fog horn, she was passed by the "Selja" astern on her starboard side (Id. 153-4). At about 2:45 A. M. a steamer's whistle was heard by Captain Lie from an unascertained direction and the "Selja's" engine was immediately stopped (Id. 154). A second whistle was then heard and located at about five points on the port bow, and the "Selja" proceeded on her course (Id.). After passing this steamer and up to 5:30 A. M. the "Selja" proceeded at full speed, or about 10 knots, with 64 revolutions of her engine (Id. 152, 154-5). At 8 A. M. the ship's course was changed from S. 70° E. Magnetic to West Magnetic (Id. 155), and her speed was reduced to dead slow (Id. 156). This dead slow speed was maintained throughout the subsequent



courses of the "Selja" up to and until 1 P. M. (Id. 156). She kept her West Magnetic course until 9:30 A. M., when she turned about and steamed east by north until 11 A. M., when she turned about and steamed due west again, maintaining this course until 1 o'clock, when she again turned about and proceeded S. 60° E. Magnetic at half speed, which speed was maintained until 3:05 P. M. (Id. 156), some eleven minutes before the collision. At 5:30 A. M. Captain Lie had commenced to take soundings and continued to do so up to the time of the collision. On his easterly courses, up to 1 P. M., these soundings were taken every half-hour, and on the two westerly courses but twice. After 1 P. M. soundings were taken every five minutes (Id. 155).

Because the "Selja's" general easterly course was on two occasions,—once at 8 A. M. and again at 11 A. M., changed to due west,—in short, because the "Selja" was put about twice that morning, counsel in the lower court contended that Captain Lie "was virtually lost in the fog". As the fog throughout the forenoon of November 22nd was heavier than in the afternoon—in the forenoon it was "very dense" and objects were only visible some two or three hundred feet (Id. 155), the proper inference (if it be important to draw any because of the changes in the "Selja's" course) is that Captain Lie was killing time and cautiously loitering at dead slow speed in the hope of seeing the fog lift, and this inference is borne out by the ship's log (IV, 1453). And when, at 1 o'clock, he finally did put his engine from dead slow to half speed, and took his S. 60° E. course, he did it deliberately because the fog had become less dense (Id.)

and for the purpose of making Point Reyes. Third Officer Bjorn expressly says as to this last change: "We was going to get Point Reyes, make Point Reyes" (Bjorn, I, 110). While on her course of S. 60° E. Magnetic, at 2:30 P. M., the Point Reyes fog siren, which all hands had been waiting for, sounded loud and clear between three and four points on the "Selja's" port bow (Lie, I, 157). At 2:50 P. M. the "Selja's" S. 60° E. course was changed to S. 65° E. for the lightship off the entrance to San Francisco harbor, and this latter course was not changed up to the time of the collision (Id. 160).

After the first officer had taken the compass bearing of the Point Reyes siren at 3 o'clock, Captain Lie was on the point of going into his chart room to lay the data off, when a deep, faint, but distinct far-off whistle was heard bearing about right ahead (Id. 160-2). The weather at the time was calm with a long, rolling westerly swell and a low fog through which the sun was shining, making objects visible at a distance of about two ship lengths (Id. 162). The Point Reyes siren, known at the time to be over a mile and a half distant, was and had been blowing every thirty-five seconds, and sounded much louder than the whistle heard ahead (Id.). On hearing this first whistle, *because it sounded so far away*, Captain Lie said: "It just came into my mind that it might be one of the fog horns off Golden Gate" (Id. 162).

This was not, we submit, as unnatural a supposition as it might appear, nor does Captain Lie's transitory thought warrant the emphasis which was given it by

counsel in the lower court. Under all the circumstances this deep, faint, far-away whistle, coming from the general direction of the Golden Gate, might, with perfect propriety, have been momentarily taken for one of the fixed whistles at the entrance to the harbor. Hearing the whistle for the second or third time, it was then timed, and by this means found definitely to be an approaching vessel (Id. 163-4). In the meantime, at 3:05 P. M., the engine of the "Selja" had been put at slow speed, because her previous half speed was not considered moderate enough under the circumstances (Id. 164). At 3:10 P. M. the "Selja's" engine was stopped (Hansen, I, 68; Bjorn, I, 115; Anderson, I, 93; Eggen; I, 68; Halvorsen, I, 52; Lie, I, 172), the vessel at the time making about 3 knots (Lie, I, 172), and at 3:15 the "Beaver" loomed in sight at a distance of about nine hundred feet and coming towards the "Selja" at a high rate of speed (Id. 172, 175). When, at about two points on the "Selja's" port bow (Id. 173), the "Beaver" was first seen, the "Selja" had swung three-quarters of a point or a point from her S. 60° E. course because of having commenced to lose headway under her stopped engine (Id.). Captain Lie *saw the escaping steam* from the "Beaver's" whistle, indicating that she was blowing three whistles, and ordered the "Selja's" whistle blown three times and at the same time put her engine full speed astern (Id. 174-5). The collision occurred about a minute afterwards (Id. 179), *while the "Selja" was moving astern* (Lie, I, 176; Halvorsen, I, 54; Bjorn, I, 118; Kidston, III, 907-8), the "Beaver" striking her six or eight feet abaft the bulkhead between No. 1 and No.

2 holds on the port side (Lie, I, 176) at an angle of between seventy and eighty degrees (Id. 175). The marks on the "Beaver" showed that her bow had penetrated the "Selja" through her plates and cargo for 18 feet on the port side and 10 feet on the starboard side (Stewart, I, 138-9). When the "Beaver" backed out from the hole she swung nearly parallel to the "Selja", bow to bow, a little more than a ship's length distant (Lie, I, 179), and in about fifteen minutes the latter sank (Id.). Two of the "Selja's" crew were lost. At the time of the collision, according to Captain Lie, Point Reyes bore north northwest  $2\frac{1}{2}$  miles from the "Selja" (Id. 180). The "Beaver's" fog whistle was heard continuously from a minute or two after 3 o'clock (Id. 161) until 3:15 P. M., and the Point Reyes siren was heard continuously from 2:30 until the collision (Id. 180).

The foregoing are the salient facts with reference to the Norwegian ship.

*As for the "Beaver":*

She is a modern passenger steamer running between this port and Portland, Oregon, 364 feet long with a displacement fully loaded of 5,950 tons on a mean draft of 19 feet 6 inches (IV, 1469), and was in command of Captain William Kidston. She left Pier 40 in the harbor of San Francisco at 12:50 P. M. on the day of the collision, bound on one of her regular trips to Portland, *fifty minutes late* (Kidston, III, 852). In her course out through the Golden Gate she passed the North Heads at 1:37 P. M. and, proceeding through the North Channel, passed Red Buoy No. 2 at 1:45 P. M. (Ettershank, II, 524, 533). In the North Channel she did not blow her



fog whistle because it was only a little hazy (Kidston, III, 853). After passing Red Buoy No. 2, the next point of departure was Duxbury Reef Buoy, which was passed at approximately 2:15 P. M. (Ettershank, II, 532), for, though it was not seen, Captain Kidston said he heard the whistle on the buoy and he judged he passed it about one-half mile off (Kidston, III, 829). At this time, Captain Kidston says, one could possibly see one-half mile, and the fog did not shut down thick until 3 o'clock (Id. 854). On leaving Duxbury Reef the "Beaver" headed into a heavy westerly swell on her regular course N. 86° W. for Point Reyes, which would be her next point of departure (Id. 796, 820). From the time of passing through North Channel, she proceeded at full speed with her engines making 77 revolutions, until at 3 o'clock Captain Kidston sent a written order to the engine room to reduce the revolutions to 76 (Id. 860-1). After passing the whistling buoy at Duxbury Reef several steamer whistles were heard forward of the "Beaver's" beam, but her master judged they were too far away to make it necessary to stop his ship's engines or reduce her speed (Kidston, III, 855-858, 885-887; Ettershank, II, 539-541). At about 3:13 P. M. Ettershank, the "Beaver's" second officer, then navigating the ship, heard the "Selja's" whistle for the first time (Ettershank, II, 505; Kidston, III, 900). Captain Kidston was not then on the bridge, but the whistle was reported to him immediately as being a point on the starboard bow (Id. 799). Going to the bridge he ordered his ship's helm put to starboard and, after she had swung one-half point to port, a second whistle was heard which, to Captain Kidston, still seemed to be a point on the starboard bow

(Id. 799-780). He thereupon stopped and reversed his engine full speed astern and ordered the wheel hard-a-port (Id. IV, 1480), after which the "Selja" loomed in sight, lying, as believed by the "Beaver's" officers, in the trough of the sea a little on the starboard bow (Id. 801). Captain Kidston admits that the "Beaver" struck the "Selja" when the latter was moving astern (Id. 907).

We have stated the facts thus fully because of the great importance of this case from a financial standpoint and the consequent necessity of a full discussion. *The basic fact of the case, however, is that the "Selja" had been able to stop her speed and was moving astern at the time of the collision.* We believe that this fact alone absolves the "Selja" from liability for prior faults, if any, and is decisive of the case.

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### Analysis of the Decision of the District Court (IV, 1392-1398).

None of the witnesses in this case were examined before the lower court and its decision was based on admitted facts and the law applicable thereto. It is, therefore, evident that no presumptions unfavorable to appellant can be drawn from the decision.

The court does not state the facts as admitted by the "Selja" with entire correctness, especially in failing to state that the "Selja" was moving astern at the time of the collision, and also in stating that the "Beaver" stopped her engines immediately on hearing the "Selja's" first whistle, but this part of the decision is

not important. The court held that the "Selja" was in fault under the latter part of Article 16 of the International Rules for not stopping on hearing the "Beaver's" first whistle, and repeatedly violated the same rule for the succeeding ten minutes; that she was apparently being navigated under former Article 18 of the rules, which simply called for the exercise of good judgment as to stopping, and that said rule had been superseded by Article 16 of the new rules, which imposed a positive duty to stop at the first whistle; that the zone of danger of collision is reached when the first whistle is heard and that the master can exercise no judgment in the matter but must stop at once.

The court also held that this fault of the "Selja" was a contributing cause to the collision, the law being that where a vessel has committed a positive breach of a statutory duty, "she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so", and that the "Selja" had not sustained this burden because *"if she had observed the rule she would not have reached the point of collision at the time she did and the 'Beaver' would have passed her."*

The court further held that both vessels were equally at fault and that there was no room for the application of the major and minor fault doctrine.

We believe that the foregoing fairly covers the decision. We shall have more to say later of it and the authorities cited in its support, but at present we simply desire to outline to the court the decision itself.

### The Assignment of Errors.

This assignment is very short and we, therefore, insert the same in full:

1. That the court erred in holding, deciding and decreeing herein that libelant recover no damages either for himself individually or for the owner of the Norwegian steamship "Selja", and in not awarding to libelant the full damages suffered by himself and said owner as set forth in the final decree herein.

2. That the court erred in holding, deciding and decreeing that the damages of the owner of the "Selja" and the libelant as her master should be apportioned under the usual rule of cross liabilities and subject to the offsets specified in clause 6 of the interlocutory decree herein, and in not awarding said damages in full without offset.

3. That the court erred in allowing any offsets under clause 6 of the interlocutory decree herein.

4. That the court erred in holding and deciding that the said steamship "Selja" was in any way at fault in the collision with the steamship "Beaver", which was the subject of this action.

5. That the court erred in holding and deciding that the said "Selja" violated the second paragraph of Rule 16 regulating the navigation of vessels at sea (26 St. at L. 326).

6. That the court erred in holding and deciding that the violation by the "Selja" of said Rule 16 was a contributing cause to the collision herein.



7. That the court erred in holding and deciding that where a vessel has committed a positive breach of a statutory duty she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.

8. That the court erred in not holding and deciding that where a vessel is so navigated as to enable her to come to a stop before collision with another vessel, after sighting such other vessel, her prior violation of said Rule 16 is not a contributing cause of the collision, and in not applying said rule to the case at bar.

9. That the court erred in holding that said "Selja" and said "Beaver" were equally at fault, and in not applying the major and minor fault doctrine and holding the "Beaver" solely liable for the collision.

10. That the court erred in not making and entering its final decree herein allowing libelant all damages suffered by himself and the owner of said "Selja", with interest and costs.

11. That the court erred in dividing the costs herein and not allowing libelant his costs herein.

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### Contentions of Appellant.

The assignment of errors is naturally an attack on the decision and decree of the District Court. The decision, however, does not touch on all the points in the case and it will be necessary to lay before this court certain features not so covered.

We shall first take up the faults committed by the "Beaver" and endeavor to show that she was not only

guilty of the fault admitted by her, to wit: excessive speed, but that she also violated the second part of Article 16 of the International Rules, and that she further violated in several respects the general prudential requirements of Article 29. We shall also endeavor to show that all of these faults were gross, with a view to later applying the major and minor fault doctrine, in case the court shall find it necessary to go into that subject.

Having laid the faults committed by the "Beaver" clearly before the court, we shall take up the two main charges of fault made against the "Selja" in the lower court. We shall first discuss the question whether the "Selja" came to a standstill before sighting the "Beaver" and violated the requirement of Article 15 by not blowing two whistles to apprise the "Beaver" of that fact. We shall then endeavor to show that the "Selja" did not violate the latter part of Article 16 as found by the lower court, in that said article had not become applicable at the time the first whistles of the "Beaver" were heard.

Having thus discussed the faults of the "Selja", we shall proceed to what is, in our opinion, the main point in the case, namely: whether, in view of the fact that the "Selja" had been able to come to a standstill before the "Beaver" reached her, and was actually *moving astern at the time of the collision*, the fault of the "Selja" in not stopping her engines until 3:10 P. M. can be held to be a fault contributing to the collision. In this connection we shall call attention to the major and minor fault doctrine and apply it to this case, and we shall further attempt to show that the decision of this court

in the case of *The Belgian King*, 125 Fed. 869, is conclusive of this litigation.

Thereafter we shall try to point out clearly that the decision of the District Court is erroneous and not supported by the authorities cited therein, after which we shall conclude the brief with a short contrasting statement as to the navigation and general discipline maintained on the respective vessels prior to and at the time of the collision.

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## I.

### The "Beaver's" Gross Violation of the Rule Requiring Moderate Speed in a Fog.

That this question of the "Beaver's" violation of the *moderate speed* rule should have been the one to which was directed more testimony than to any other issue in the case is made significant when it appears that at the oral argument in the lower court, counsel, evidently impressed with the futility of the effort that had been made, admitted the violation of the rule. Had this admission been candidly made in the pleadings, much of the large record in the case would have been saved. If, when made, it was in the hope of *diverting* attention from the *flagrancy* of the fault, counsel is doomed to disappointment, for, after appellant has gone to so much effort and trouble to establish such fault, it will not now be sidetracked by counsel's confession from pointing out to the court the gross, almost criminal, recklessness of the "Beaver" in her violation of the moderate speed rule.

At the same time, however, it should also be noted that it makes little difference in this case, in view of appellee's confession of fault, whether the "Beaver" ran at a speed of 15 knots, as we contend, or at a speed of about 12 knots, as appellee contends. If the point of collision is where our evidence places it, the former result follows, while, if it was where Captain Kidston locates it, we reach the latter result. We enter upon a brief discussion of this subject (1) in order to show the gross character of the "Beaver's" fault, and (2) to explain to the court the purport of much of the evidence, which might otherwise be misunderstood and so that the court may read the record understandingly. Counsel will doubtless attack our conclusions both as to the speed of the "Beaver" and the point of collision, but it will be helpful if, in so doing, he will also clearly point out *how the result of the case can be changed, whichever conclusion is adopted*. Unless he can do this, his discussion will be of very minor importance.

As has been intimated, to no single point in this case was so much testimony directed as there was to a determination of the "Beaver's" speed. The libel in the original suit charged that she was making *11 knots or more* at the time she was sighted by the "Selja's" officers one minute before the collision. The *answer* of the claimant *denies* this, but fails to state what the vessel's speed was. However, in answering the fifth interrogatory propounded in the libel in the *freight suit*, the claimant in the original suit says that her speed at 3 o'clock was *11 knots* with 77 revolutions and a slip of 25 per cent (IV, 1469). In Captain Kidston's sworn



report made to the United States Local Inspectors of Hulls and Boilers, three days after the collision, no mention is made of the "Beaver's" speed, though he said that at 3 o'clock he sent written instructions to the chief engineer "*To slow the engine to 76 turns per min.*" (IV, 1479-80). (These instructions, however, did not reach the chief engineer until 3:10 P. M. while he was in his stateroom) (Paul, II, 628, 633). At the hearing before the Inspectors on November 25th, Captain Kidston, answering a direct question as to his ship's speed, said: "*I ascertained after—11 knots—76 turns*", and that her full speed was 17 knots (Kidston, III, 877). Later on in his examination at this hearing he said he was running full speed through the North Channel, but that when he left the North Channel he was running *11 knots* (Id. 878).

Robert S. Paul, the "Beaver's" chief engineer, at the hearing before the Inspectors said that the best speed the ship had ever made was 16 knots (Paul, II, 639), but that on the day of the collision he slowed her to *13 knots* (Id.) and that she was not making more than 13 knots at any time on that day.

Joseph Ettershank, the "Beaver's" second officer, and her navigating officer just before the collision, testified at this hearing that the ship's speed by the log was "*Around 12 or 12½ approximately*". At the hearing before the Commissioner he testified that at the time the "Beaver's" engines were reversed, a minute before the collision, she was making *13 knots, which was a reduction from the speed she had been making before that* (Ettershank, II, 520); that she was supposed to be

going at full speed before that, and that Captain Kidston had told him that the speed had been reduced to 76 revolutions of the engine (Id. 522-3). This witness also testified that between 1:45 P. M. and 2:15 P. M. the "Beaver" was making around 15 knots (Id. 531); that in the eight minutes elapsing from 1:37 P. M. to 1:45 P. M., when the vessel was passing from the North Heads to Red Buoy No. 2, a distance of two miles, *she made 15 knots* (Id. 534).

Chief Engineer Paul testified in this case that the "Beaver" was making *about 15 knots* through the North Channel (Paul, II, 602); that after leaving the North Channel the vessel's speed would be retarded by the force of the wind and sea (Id. 604-5), and that the sea on that day would reduce her speed about three knots (Id. 606). He also says that when he gets a *full speed* order from the bridge he puts his engine about 77 revolutions, and that *full speed is 77 revolutions* (Id. 617-18); that Captain Kidston must know that 77 revolutions is the ordinary full speed of the vessel when telegraphed from the bridge, and that, if a greater number is wanted, he sends a written order to the engine room naming the revolutions desired (Id. 620); that aside from unusual conditions *77 revolutions is a fixed number of revolutions on a full speed order from the bridge, and at these revolutions the vessel can make 15 knots* (Id. 624-5); that the order sent to him at his room to put the engine at 76 revolutions, reading: *Please slow to 76 turns per min.*" (Id. 633) was received at 3:10 P. M., and that it went from him immediately to the engineer on duty at the time in the engine room (Id.

629-30); that you must *experiment* with the engine before one would succeed in reducing from 77 revolutions to exactly 76 (Id. 632). He further said that he did not know the slip of the propeller at any time on the day of the collision (Id. 658), and did not know from where the information came that the "Beaver" was making only *11 knots* (Id. 651). Mr. A. J. Frey, who answered the fifth interrogatory of the freight libel, said that to the best of his recollection he got his information that the speed of the "Beaver" was *11 knots* from the engineer's log (Frey, II, 718).

The record of the engine room bells rung up from the bridge shows that the "*Beaver's*" engine was put at full speed at 1:04 P. M. and remained at full speed without change until 3:15 P. M. (Paul, II, 649). Captain Kidston, testifying in this case, said that at 3 o'clock the "Beaver" was making in the neighborhood of *12 knots*, and that the vessel had cut her speed down three knots (Kidston, III, 804). On cross-examination he said that when he gave the order at 3 o'clock to slow to 76 revolutions, he wanted the "Beaver" to make *about 12 knots*, and that *12 knots would be a reduction of the speed which the vessel had made through the North Channel and also up to Duxbury Reef* (Id. 861-2); and that he made a calculation at the time, which showed that the "Beaver" passed from Red Buoy No. 2 in thirty minutes, a distance of *6½ miles*, which would be a speed of *13 knots* (Id.).

Captain Kidston further said that *he was complying with the moderate speed requirement of Article 16 when he was making 12 knots* (Id. 864); that he knew when

he gave the order at 3 o'clock to reduce the revolutions to 76 that the engineer would, *within five or six minutes*, be able to execute the order (Id. 866), and that this order was not intended to reduce the speed of the ship, but to establish a fixed rate of speed (Id.), although he said that at 3 o'clock the fog had shut down thick (Id. 854) and, if there had been no fog he would not have bothered about reducing from 77 to 76 revolutions (Id. 867). He further said that the swell was a *long, smooth one* (Id. 870) and, after he got clear of the North Channel, it would retard the speed of the "Beaver", and it did this after leaving Duxbury Reef to the extent of three knots per hour (Id. 869). "*At most times*" the witness differs with the statement found in the Coast Pilot book issued by the Geodetic Survey to the effect that "*immediately outside the bar there is a slight current to the northward and westward known as the Coast Eddy Current*" (Id. 872); and he said that such a current, if it was setting with the ship, would help to overcome the retarding effect of the swell (Id. 873). The witness then said that he had made a mistake in his testimony before the United States Inspectors when he said the speed of the "Beaver" was 11 knots (Id. 878); that he did not know where Mr. Frey got the information embodied in the answer to the fifth interrogatory made in the freight suit (Id. 880), and that the statement therein contained was not in accordance with the facts (Id.). He further said that the rule was to stream the "Beaver's" log and set it at zero at Red Buoy No. 2, and that he presumed the order was carried out on the present occasion (Id. 883-4); that the log



was hauled in immediately when he gave the full speed astern order at 3:15 P. M. and that the reading *reported* to him was 19.6 (Id. 812). As bearing on the character of the swell into which the "Beaver" was headed that day and which, in the opinion of the witness, reduced the speed of his ship three knots per hour, he says: "*I have made as low as five knots with that same ship in a heavier swell*" (presumably with the engine at full speed) (Id. 864).

We do not desire to unnecessarily prolong this brief by a detailed examination of the evidence of the various *experts* on the extent of the effect of a head swell on the speed of a ship of the "Beaver's" type. The three experts called for the appellant, Mr. James Dickie, Mr. Heynemann and Mr. D. W. Dickie, are men of eminence in their profession, especially Mr. James Dickie, who has an international reputation. All three of these gentlemen squarely testify that *such a head swell would not materially retard the "Beaver's" speed* and give sound reasons for so testifying (see especially James Dickie, II, 460-1; III, 1101-2). We ask the court to read their evidence and it will be sufficient to say that, as between them and the experts called for the "Beaver", there is an irreconcilable conflict, and perhaps necessarily so, because the matter must be dependent on variable conditions. Neither is the run of 19.6 knots, as reported shown by the "Beaver's" log, of any importance, for the reason that, aside from its hearsay character, its reliability depends solely upon the accuracy of the knowledge of the time and place the log was set. There is evidence that it was *ordered* set at a certain place,

but whether it was or not can only be guessed at, for the quartermaster, whose duty it was to obey the order, *was not called as a witness*, and all that is definitely known about the matter is that a whistle was blown by the second officer from the bridge which meant that the time had arrived for the quartermaster to perform a certain duty,—whether he did it at that particular time or not is pure conjecture. *In view of the fact that the written order given to the quartermaster at 3 o'clock to reduce the revolutions of the ship's engines was not delivered until 3:10 P. M.*, we submit that it is not at all improbable that the execution of the whistled direction to stream the log may have been similarly delayed, and, in view of the facts which we now propose to discuss, this must have been the case.

The legal test of the speed of a vessel, with reference to other vessels, which are themselves moving, is her speed *through the water* and not *over the ground* (*The Yarmouth*, 100 Fed. 667). Judged by this test, the swell so much talked of in this case becomes immaterial (except as regards the point of collision); the vessel was making *her full speed through the water*, and *this was at least 15 knots*.

**A DETERMINATION OF THE APPROXIMATE PLACE OF THE COLLISION WILL SETTLE CONCLUSIVELY THE SPEED OF THE "BEAVER".**

We fortunately have in this case a determined fixed rate of speed over the ground which the "Beaver" is known to have made between two fixed points, namely: between the North Heads, which she passed at 1:37 P. M., and Red Buoy No. 2, which she passed at 1:45

P. M. With her speed known to be *15 knots* at this time, and her engine remaining unchanged for the next hour and a half, or until 3:15, we can know the distance traveled and at what rate of speed over the ground, if the point of collision can be fixed. If the rate of 15 knots remains unchanged from 1:37 to 3:10 P. M., the place of the collision can be approximately fixed, for from 1:37 P. M. to 3:10 P. M. she would have traveled  $23\frac{1}{4}$  miles on a straight course at the rate of 15 knots per hour (Lie, I, 187; D. W. Dickie, II, 360; Heynemann, II, 385; James Dickie, II, 428). In discussing the distance traveled over the ground by the "Beaver" we need not consider the attempted reduction of her engines' revolutions at 3:10 P. M. from 77 to 76, for the reason that the uncontradicted evidence is that the reduction in distance traveled (*assuming that the reduction was accomplished at exactly 3:10 P. M.*) would be but 83.45 feet less than it would have been had the revolutions remained at 77 up to 3:15 P. M.

In determining the place of collision it is appropriate to examine the matter in the light of the movements of both ships. On the part of the "Beaver" we know that she was going at *full speed* practically up to the moment of collision, and we know that at full speed she could make and had been making 15 knots over the ground up to Red Buoy No. 2. These are established facts. If the place of collision is that fixed by Captain Kidston, six miles from Point Reyes light and four miles from South End, then the "Beaver's" speed over the ground after leaving Red Buoy No. 2, although still *full speed through the water*, was unwittingly reduced to between twelve and

thirteen knots by the swell or some other unknown cause. On the other hand, if the point of collision is at the place fixed by Captain Lie, then the speed of the "Beaver" over the ground remained at approximately 15 knots up to the time of the collision.

We propose, therefore, to now examine the appellant's case touching the movements of the "Selja" prior to the collision, and the facts now to be adverted to are established by the testimony of the officers of the "Selja", and on the material points there is no conflict.

*At 2:30 P. M., while the "Selja" was on a course of S. 60° E., the Point Reyes siren was heard bearing east by north. This is the basic fact which, if found, destroys absolutely appellee's contention that the collision occurred some six miles from Point Reyes. Continually hearing this siren at intervals of thirty-five seconds, the "Selja" proceeded on her S. 60° E. course at 40 revolutions of her engine, or at a speed of 6 knots per hour, until 2:50 P. M., when she changed her course to S. 65° E. and this course remained unchanged until the collision. The "Selja's" six knot speed was maintained until 3:05 P. M., when it was reduced to slow, and at 3:10 P. M. her engine was stopped and remained stopped until the "Beaver" loomed in sight.*

All the facts stated in the foregoing paragraph are conclusively established by the testimony of the "Selja's" officers, which is very brief and should be read in full (I, 42-132). This testimony was taken on December 2nd, 1910, only ten days after the collision, before the appellee's defense had been even outlined, and when the events were fresh in the minds of the witnesses.



Captain Lie knew that the whistle was the Point Reyes signal, because it could have been nothing else (Lie, IV, 1175-6). Point Reyes was the very point they were making for (Bjorn, I, 110).

Learned counsel in the lower court did not offer one helpful suggestion as to what other signal it could have been, for they know it could have been nothing else. We cannot forbear calling the court's attention to Captain Lie's righteous indignation when, during his cross-examination, months after the collision, the remarkable suggestion that he did not hear a whistle at all was first made to him:

Q. Don't you know you didn't hear that whistle at all?

A. That I didn't hear it?

Q. Yes.

A. I know that's a damned lie. I deny it. I heard it.

Q. Don't say damned lie to me, Captain. Don't you know you didn't hear it at all?

A. That astonishes me for you to say I didn't hear that whistle. Do you think you can scare me? I don't want you to treat me like a liar, because that is absolute that you believe I am lying; you must believe it.

(Lie, IV, 1175-6.)

It is a well established principle of law, than which none is better grounded, that the testimony of witnesses aboard a vessel as to what they and that vessel did is to be preferred to testimony of those on another vessel.

“What a witness asserts he did, or did not do on his own vessel at the time, is generally more satisfactory evidence of the facts than the opinion and

belief of a dozen others formed from what they supposed they saw or heard on another vessel."

*The Steamboat Neptune*, Olcott, 495, cited with approval in *The Fannie*, 11 Wall. 238 (20 L. Ed. 114).

See also:

*The Geo. W. Elder*, 203 Fed. 523, 534;

*The Hope*, 4 Fed. 89;

*The Philadelphian*, 61 Fed. 862;

*The Sam Sloan*, 65 Fed. 125;

*The Natchez*, 78 Fed. 183;

*The Captain Sam*, 115 Fed. 1000;

*The Dorchester*, 121 Fed. 889.

In the case at bar the facts referred to, as established by the testimony of the "Selja's" officers, are only disputed through *inferences* drawn by appellee from *other disputed facts*. Indeed, considering the numerous conflicting statements of the "Beaver's" own witnesses as to what her speed was, it is difficult to place any reliance whatever on her testimony in this regard.

*We, therefore, submit that it is conclusively established that the "Selja" heard the Point Reyes whistle at the times testified to, that she was on the courses testified to, that her speed was as testified to, and that her engine ran as testified to.*

For thirty-five minutes, then, the "Selja" was proceeding towards the place of collision at the rate of 6 knots per hour, and for five minutes at the average rate of something more than 3 knots per hour. Under the six knot speed the distance traveled for the thirty-five

minutes would be 3 knots and 3,040 feet, and for the remaining five minutes (under the reduction from half to slow speed), 2,025 feet (Libelant's Ex. 1). It is admitted by the answer of the claimant and the uncontradicted evidence shows that at about 3 o'clock the "Selja" heard the "Beaver's" whistle. At that time, according to the testimony of Captain Lie, the vessels were 4.83 knots apart.

The question as to the approximate accuracy of Captain Lie's work in fixing the various *bearings* of the Point Reyes siren is an important one, for if, at 2:30 P. M., when it was first heard, it bore East by North, and at 2:50 P. M., N. 30° E., and at 3 P. M. due North, or if these bearings were but approximately accurate, then we submit it would be physically impossible for the "Selja" to have reached the place of collision, as fixed by Captain Kidston, at 3:15 P. M. Captain Kidston's report to the United States Inspectors (IV, 1479-82) states that from the place of collision Point Reyes bore N. W. by W.  $\frac{1}{2}$  W. 6 miles, and South End N. W.  $\frac{1}{2}$  N. 4 miles. On Libelant's Exhibit 1, the map of Drake's Bay, Captain Lie has marked these two bearings: the Point Reyes "(1)", the South End "(2)", and the point where they would intersect "(3)" (Lie, I, 196). He was then asked how far the "Selja" would have to travel to reach that point of intersection by 3:15 P. M., if at 3 o'clock the Point Reyes siren bore due North, and he replied that she would have to travel 5.6 knots and that the rate of speed would be 22.4 knots per hour (Id. 196-7).

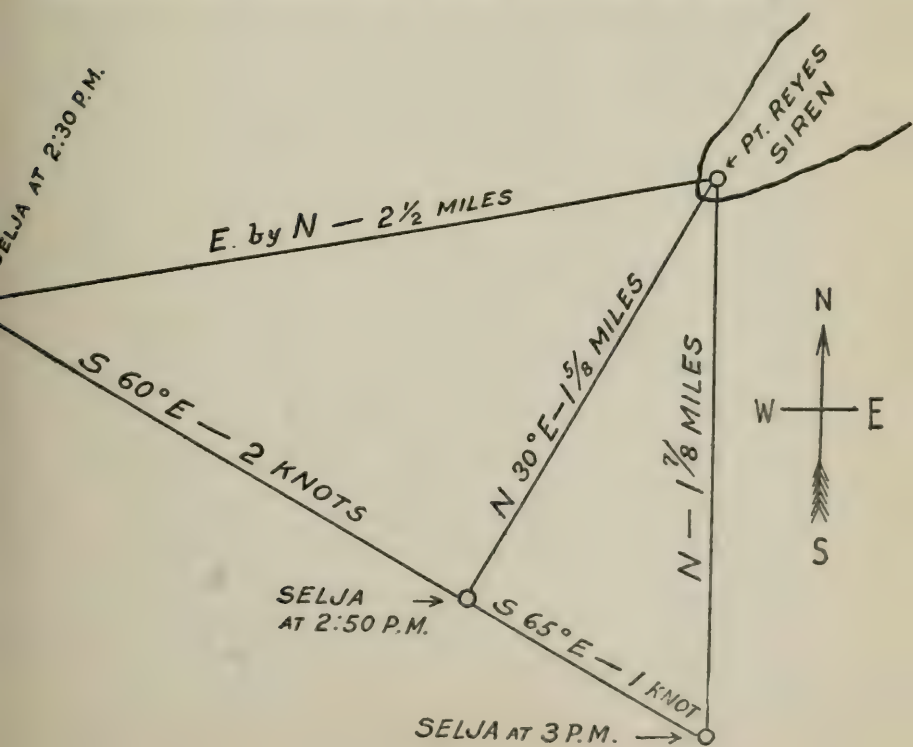
Captain Lie heard the first siren blast at 2:30 P. M. loud and clear (Id. 157); he did not expect to hear it so strong because his sailing directions said that the sound was obscured to the northward (Id.). The first whistle sounded between three and four points on the "Selja's" port bow. The compass bearing of the second whistle, thirty-five seconds later, was East by North (Id.). The distance traveled by the "Selja" on her S. 60° E. course from 2:30 P. M. to 2:50 P. M. was logged and found to be 2 knots, and the bearing was again taken at 2:50 P. M. and found to be abeam of his ship, or N. 30° E. (Id. 158). The soundings which had been taken up to that time, and the distance run, were then plotted by Captain Lie on his chart. From 2:50 to 3 o'clock the "Selja" traveled another knot, and at 3 o'clock another compass bearing of the siren was taken and found to be due North (Id. 159). Is it possible that, hearing that siren every thirty-five seconds loud and clear for half an hour, these *bearings* could be appreciably wrong? They would have to be wrong to absurd limits if the place of collision is as fixed by Captain Kidston. Captain Kidston himself had no trouble in fixing the bearing of Duxbury Buoy whistle when he heard but two of them (Kidston, III, 863).

The distance run between 2:30 P. M. and 2:50 P. M., as found by the "Selja's" log, checked up and verified the bearings found at 2:30 and 2:50 respectively. In other words, if the bearing taken at 2:50 after a run of 2 knots had not been N. 30° E., it would have conclusively shown that either the distance run was wrong or else the first bearing of East by North was wrong. And



the bearing of the Siren due North at 3 o'clock proved the correctness of the bearings taken at 2:30 and 2:50 respectively (Lie, I, 341-2), as well as the distance it was off at those respective times (Id.).

At the time of hearing the siren at 2:30, Captain Lie did not know its exact distance away, but he later ascertained it to be  $2\frac{1}{2}$  miles (Id. 158). In plotting his data after 2:50 P. M. he found that the "Selja" at that hour was  $1\frac{1}{2}$  miles from the siren (this was afterwards checked up on a chart of larger scale and found to be  $1\frac{5}{8}$  miles). At 3 P. M., when the siren was sounding due north, he did not know the distance, but, a day or so after the collision, he plotted the data and found the distance at 3 o'clock to be  $1\frac{7}{8}$  miles (Id. 160). The accompanying diagram will show the situation clearly:



Of course, with the bearings fixed and also the course and distance run, nothing else is required to mathematically fix with exactness the distance the siren was from the "Selja" (Id. 342). It is hardly possible, hearing this strong siren blast of two or three seconds' duration, sounding at intervals of thirty-five seconds for thirty minutes, sound in fact nearly fifty times—that a skilled, alert, well trained navigator, such as Captain Lie showed himself to be, could have been appreciably in error in the bearings of that sound. His whole attention at the time must have been given to the matter, for it spoke to him the end of his long voyage across the Pacific.

We have said little in the foregoing argument as to the *soundings* taken by the "Selja" for the reason that we do not think them of great importance. However, when one commences to compare soundings actually taken on a vessel with those shown on a chart, and expects to find them in absolute harmony, he is looking for the impossible. The soundings shown on a chart are taken at a certain tide and at certain points. If your vessel is passing over those certain points at the time when the height of water is the same as it was when the chart soundings were taken, then your soundings from the vessel and on the chart would perhaps correspond, but otherwise not.

In conclusion of this subject we confidently submit that the established movements of the "Selja" verify and confirm Captain Lie's statement as to the place of the collision, and, as a consequence, clearly show that the speed of the "Beaver" prior to the collision was full speed and at the rate of 15 knots per hour over the

ground, or approximately 1520 feet per minute. In a fog so dense that objects were invisible at a distance of more than nine hundred feet, the “Beaver’s” speed was maintained with never a thought of reducing it. She was going as fast as she would have gone had the sea been bathed in sunshine and the horizon visible for miles around. Captain Kidston wanted and he had “the *full power on the ship*” (Kidston, III, 867). Going at such a speed, the absolute futility of attempting to stop after sighting a vessel and before colliding must have been known to the “Beaver’s” master, but he seemed not to have cared. He came near running down two fishing boats (Johnson, IV, 1230, 1245); he heard their whistles ahead, but nothing seemed to move him from his lethargy,—he was late and other vessels must keep out of his way. Providentially the fishing boats did, but he found his victim in the unfortunate “Selja”.

“It does not require more than a statement of the case to show that whatever view one takes of the important points of conflict between the parties the ‘Oravia’ is clearly to blame. Counsel for the defendants was practically driven into the unpleasant position of having to admit that, when it was pointed out, on the evidence of the master of the ‘Oravia’, that vessel was going at 10 knots at least—it may have been a little more—in a fog, which was so thick that he could not see more than three or four hundred yards, and the case of the ‘Oravia’ is hopeless for that reason.

\* \* \* \* \*

To say that this is a moderate speed is really hopeless and one must say that, notwithstanding the long experience and high character of the master of the defendant ship, I am afraid this part of the case is simply an example of taking the risk of going too fast in the expectation that there is nothing in the

way, and that, if there is anything, their whistles will be heard in time to stop and reduce speed.”

*The Oravia*, 10 Asp. 434.

The Circuit Court of Appeals in *The Columbian*, 100 Fed. 991, a case to which we will refer again, says of that vessel's speed:

“The steamer was clearly in fault for excessive speed (9 or 10 knots). Indeed, considering the known frequenting of the locality, her speed was without due regard for human life. This is none the less true because the frequent condemnations by the courts of excessive speed in fogs has not yet broken up what is described in the *Umbria*, 166 U. S. 404, 409; 17 Sup. Ct. 610, 612; 41 L. Ed. 1053, 1057, as a ‘custom’ which ‘implies a flagrant disregard of the safety of other vessels’.”

The speed of the “Beaver” was so great that in a fog such as existed no precautions could have been taken by a vessel in her track to get out of her way. Of course, if her frenzied speed could have been foreseen, then the “Selja” could have saved herself. As it was, the “Beaver” steamed in utter disregard of the rights of other vessels, which might have been and were using the waters of that locality, and the argument of counsel in the lower court seemed to savor of the suggestion that, even though the “Beaver” was running amuck, the Norwegian ship should have known it and given her a wide berth. We know of no rule of law which would charge the “Selja” with such knowledge.

Mr. Flood, Norway's representative at the International Marine Conference of 1897, in speaking of speed in a fog, said:



“Safety at sea depends more on regulations of speed in thick weather than anything else. You may illuminate your vessels from stem to stern; you may furnish them with fog signals so as to make the whole vessel a gigantic music-box; it will do no good, unless the speed, in foggy weather \* \* \* is reduced within reasonable limits.”

Protocol of Proceedings, Vol. I, p. 426.

We have gone into this question of the speed of the “Beaver” at this length because of the time spent in the lower court on this subject, and also to place the facts fully before this court. We again repeat, however, that it is not a matter of great importance whether the “Beaver” in fact made 15 knots or whether the weather and sea conditions reduced her speed to 13 or even 12 knots, or even whether the point of collision is the one fixed by Captain Lie or that fixed by Captain Kidston (see Lie, IV, 1188). *The point is that the “Beaver” was running at her full speed in a dense fog and committed as gross a violation of the rule as to moderate speed as any vessel could commit.* Her share in the responsibility for the collision is, therefore, clearly and definitely established, and we have dwelt on the evidence on the subject rather to show the enormity of her fault than to establish the fault itself.

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## II.

### **The “Beaver’s” Gross Violation of the Stopping Requirement of Article 16 as Well as the General Prudential Requirements of Article 29.**

While the excessive speed of the “Beaver” was her main fault, and so reprehensible as to overshadow all

else, it was not her only fault contributing directly to the collision and the loss of the "Selja", for, besides changing her helm between the "Selja's" first and second whistle, and before sighting the "Selja", under most *condemnatory circumstances* she violated the stopping requirement of Article 16, as well as failed to reverse her engines on hearing the "Selja's" first whistle, as was made mandatory by Article 29, because the "*special circumstances*" at that time were so manifestly present as to call for instant action to retard the ship's alarming forward movement. These faults appellee has not confessed, but the uncontradicted testimony of its own witnesses so convincingly establishes them that they might as well have been.

The situation surrounding the navigating officer on the "Beaver's" bridge, when the "Selja's" first whistle was heard, can in no way cloak his conduct with that measure of discretion sometimes allowed in moments of imminent danger. It is true as a matter of fact that the situation was fraught with sickening peril, but its imminency played no part in the action or inaction of this officer. What were the known circumstances immediately attendant upon the threshold of this tragedy? This fine passenger boat, laden with its human cargo, almost at the entrance of the largest port on the Pacific, was proceeding at a frightful speed *along the customary track of vessels coming down the coast* (several having already been passed dangerously close) through a fog so dense as to have made it physically impossible, after coming in sight of another vessel, to overcome her headway before a collision. Under these circum-

stances, necessarily known to have been fraught with continuous peril, where nothing but the sanest, most prompt and energetic maneuvers would be of the slightest avail to avert an ever present disaster, where the lives of the ship's passengers were absolutely dependent upon constant vigilance, cool judgment and quick skill; under these circumstances, the man of all others especially selected to cope with all situations of peril, the man solely responsible for the existence of this particular peril, was not at his post of duty but had turned the navigation of his ship over to the second officer.

A steamer's whistle was heard almost dead ahead and so indistinctly that the quartermaster on the bridge with Ettershank said: "*Did you hear that whistle?*" (Ettershank, II, 506). Yes, Ettershank had heard the whistle and, in the crisis thus precipitated through the whistle's warning, what did he do? *He sent for the absent master* (Id.), and in so doing robbed the "Selja", as far as any act of his was concerned, of her last possible escape from certain destruction. Ettershank must be charged with full knowledge that, in navigating that ship at her full speed, under the then existing circumstances, he was doing so in *continuous* violation of a law intended to prevent the happening of the very thing that the "Selja's" first whistle foreshadowed to him. Yet, in face of the ominous warning to *stop* his vessel's speed, he continued to persist in it and, as a substitute, sent for the absent master.

We submit that, as the navigating officer of the "Beaver", Ettershank's breach of his legal duty to

instantly, when so warned, do all in his power to meet and counteract the responsibility which his then existing wrongdoing carried with it, fastened upon him *the added transgression of failing to stop and reverse his ship's engines*. Had he acted with the skill and promptitude demanded by these circumstances of his own making there would have been no tragedy. If he was not conscious of his responsibility, or of the ever constant danger involved in his ship's speed; if he was deficient in judgment or had been denied the right to act in time of peril further than to send for the master; then he had no place on the bridge of that ship and to have placed there such a man, restricted either mentally or by rule, was in itself a clear violation of Article 29 directly contributing to the collision, for it was the neglect of a most obvious precaution required by the special circumstances, under which the "Beaver" was then being navigated, not to have had the navigation of the vessel in the hands of one fitted in every way to meet, as far as human judgment and foresight could do so, the unknown contingencies inevitably to be expected. An officer who knew no more or had no more power given him than to send for the absent master in the face of such a warning, given under such compelling conditions, was no better than a child,—an automaton, whose very presence on the ship's bridge as her navigation chief was a continuing menace and all but criminal.

Kidston promptly complied with Ettershank's message and, when he asked, "*Is the whistle close aboard?*" was informed "*It was indistinct—I did not hear it very loud*" (Kidston, III, 895). Thereupon, with full con-



sciousness of the risk he was running in not *instantly* doing what Ettershank had failed to do, he said, "*We will hear it again—I will get it myself*" (Id.). And, while waiting to "hear it again", and in total ignorance of the position of the vessel, whose warning he was to hear again, *he created a new situation* of peril by ordering the "Beaver's" wheel put to starboard (Id., 896). A more reckless order under the known circumstances could hardly have been given, for, in ignorance of every vital fact which would bear on the propriety of changing the vessel's course, the existing risk was deliberately increased through the taking of the chance of shooting clear of the unknown on another course. Kidston must have recognized that to the peril of his ship's immoderate speed there had been suddenly and definitely added this unlocated peril ahead, but he was fifty minutes late already and, rather than sacrifice the call for speed in a fog, he deliberately increased the peril by taking another chance, the consequences of which were to him totally unknown.

Captain Kidston then heard the whistle himself, and immediately concluded he had done wrong in starboarding and that the unseen vessel ahead of him was *crossing his course*, and acting on this assumption he put the "Beaver's" wheel hard-a-port (Id. 800). *A few seconds* later the "Selja" loomed in sight lying in the very direction in which the "Beaver's" course had last been put. Kidston admits that had he not made this last change of the wheel the collision would not have occurred (Id. 903).

The conduct of these two officers in failing to stop the ship's engines under the circumstances related was in direct violation of the stopping requirement of Article 16, as well as the general prudential requirement of Article 29, and in both instances these acts were proximate causes of the collision. From this conclusion there can be no escape, for the facts are uncontradicted and show that the things done and the things left undone, between hearing the "Selja's" first whistle and before sighting her, were deliberate acts uninfluenced by excitement or other circumstances usually attendant upon maneuvers performed when vessels are in sight of each other and in extremis. The only known warrant for excitement lay in the reckless speed of their ship, but, if this cause of their own making affected their actions in the least, the record does not disclose it. Furthermore, Ettershank's fault on hearing the first whistle was equally Kidston's, for the latter was fully apprised of the whistle's uncertain position, and yet he waited to hear it again. The gravity of their faults lay in the conscious knowledge that, because the "Beaver" at the time was in the actual violation of the speed rule, the obligation to obey, when warned, the associated requirements to stop and reverse became doubly imperative. The stopping requirement of Article 16 presupposes that the moderate speed rule is being complied with,—if it is not, then the danger in hearing an unlocated whistle ahead is vastly increased and, of course, as the danger is increased, the obligation to obey the rule becomes the more pronounced. In truth, a warning, such as was given to these men, carried with it not only a peremptory demand that the ship's engines be stopped and re-

versed, but also in emphatic measure it called to their consciousness their then present wrongdoing. Yet all went unheeded—they were making up for lost time in starting and were bent on taking any chance that would further that end.

Furthermore, with the “Selja” just about at a standstill when first sighted, and her signal immediately being given that she was going full speed astern, the situation showed that the “Beaver” actually and deliberately followed up and ran down the retreating “Selja”. If a minute elapsed between the three whistles of the “Selja”, showing her retreating movement, and the collision, then, it was another grave fault that Captain Kidston did not throw the “Beaver’s” wheel back to starboard. Had this been done the “Beaver”, if she had struck at all, would have done so forward of No. 2 hold, and such a blow the “Selja” might have survived. Having had the report from Ettershank that the whistle was one point on the “Beaver’s” starboard bow, having a minute later himself located the second whistle as one point on the starboard bow, and, a few seconds later seeing the ship on his starboard bow headed across his course, Captain Kidston must have known that the “Selja” was making little, if any, forward movement and was in a favorable position to respond almost immediately to a stern movement. Being notified that she had commenced such stern movement, when the vessels were approximately nine hundred feet apart, it would seem to have been the height of folly for Captain Kidston to have allowed the “Beaver’s” wheel to remain as it was. The only chance of avoiding

the collision with the wheel that way lay in the ability to stop the "Beaver's" headway before she could reach the "Selja"; while, if the wheel had been instantly put hard-a-starboard on sighting the "Selja", there would have been given the other chance of clearing her bow.

We submit, in concluding this subject, that we have clearly shown gross fault on the part of the "Beaver" in the violation of both parts of Rule 16 and of Rule 29. As her immoderate speed was admitted, it might fairly be said that much of this discussion was unnecessary. As, however, the lower court held that the principle as to major and minor faults did not apply, and that both vessels were equally at fault, it has seemed appropriate to deal fully with the faults of the "Beaver" so that later they may be contrasted with the alleged faults of the "Selja", to which latter subject we now pass.

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### **Faults Charged Against the "Selja" Which Are Said to Have Contributed to the Collision.**

We would preface a consideration of this subject by reverting to the fact that not only does appellee stand convicted of fault by its own belated confession as to <sup>in</sup> moderate speed, but it also is clearly convicted of further faults as shown by its conduct after the "Selja's" first whistle was heard and before the vessels had come in sight of each other, these latter faults being established by its own uncontradicted evidence, and being each in itself sufficient to account for the collision. Furthermore, all the "Beaver's" faults



existed at the time of the collision and consisted of the breach of statutory rules. In approaching, therefore, the subject of the "Selja's" alleged contribution to the collision, we would ask the court to bear in mind the matters above suggested.

Under an analogous situation Mr. Justice Brown, speaking for the Supreme Court, said:

"Upon the findings of the Circuit Court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by Rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her. Upon hearing the fog horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. Indeed, upon the testimony in this case, it was open to doubt whether, if the engines had been at once stopped, the steamer would have come to a standstill, before she had crossed the course of the barque. There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it *by a change of the helm*, without taking the additional precaution of stopping until its location is definitely ascertained." (Citing cases.)

\* \* \* \* \*

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account

for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

*Alexandre v. Machan* (The City of New York),  
147 U. S. 72 (37 L. Ed. 84; 90).

More appropriate words could hardly be found.

To begin with, the "Selja's" claimed contribution to this collision rests on two absolutely inconsistent contentions; first, it is said she contributed through her failure to stop her engines two or three minutes after 3 o'clock when the "Beaver's" first whistle was heard, and that this was a continuing fault up to the time she did stop them, some six minutes before the collision; and second, it is contended that the "Selja" was stopped in the water and had no way upon her for *ten minutes before the collision*, and contributed to it in failing to blow two whistles as indicating that fact as required by subdivision b of Article 15.

It will be noted that, besides their inconsistency, neither of these contentions, if true, played the slightest part in influencing the maneuvers of the "Beaver", whose speed and conduct would have been the same in any event. Their inconsistency, moreover, is plainly seen from the uncontroverted record, for, it being *admitted by the pleadings* as well as proven by the uncontradicted testimony of the navigating officers of the "Selja" that, when the "Beaver's" whistle was first heard, she was going at half speed or 6 knots per hour;

and it further being proven by the same testimony that at 3:05 her engines were put at half speed or 3 knots; it would have been a physical impossibility for her to have been *stopped in the water with no way on her* for ten minutes before the collision, unless she had stopped her engines sometime *before* hearing the "Beaver's" whistle at 3 o'clock and had not put them in motion again, and, of course, the inconsistency increases as and when applied to the succeeding whistles of the "Beaver".

That appellee should deem it expedient to resort to inconsistent theories on which to base a charge of contributory negligence is clearly indicative of uncertainty as to the conclusiveness of either. While it may be helpful sometimes to charge cumulative faults, it certainly is an admission of weakness to attempt cumulative charges of such character that proof of the truth of one must necessarily defeat the other. As we have no means of forcing appellee to an election of its inconsistent contentions, of necessity we must discuss both of them. It would, however, seem proper to fairly and squarely ask counsel for appellee whether, *on the facts*, they contend that there was a violation of Rule 16 as well as of Rule 15, and we now specifically ask them, if they so contend, to explain fully how *both* rules were violated.

We would also say that certain further and minor faults were briefly charged against the "Selja" in the lower court. We do not believe, however, that they will be relied on in this court and feel that it is useless to go into them at this time. The case of *The Umbria*, hereafter cited, will, we believe, fully meet any and all of such minor charges of fault.

## III.

**The Contention That the "Selja" Had No Way on Her for Ten Minutes Before the Collision and Violated Rule 15 by Not Indicating That Fact to the "Beaver" by Two Whistles.**

Although this contention was strenuously made by the appellee in the lower court, we do not take the same very seriously. We believe that the following facts are absolutely established in this case and can only be found to be untrue by discrediting the evidence of all of the "Selja's" officers:

1. That at 3 p. m. the "Selja" was proceeding at a six knot speed and so continued until 3:05 p. m. This fact is also *squarely admitted in the pleadings* (I, 25; IV, 1468) and, of course, cannot now be controverted.

2. That at 3:05 p. m. the "Selja" reduced her rate of speed to three knots, which rate was continued till 3:10 p. m.

3. That at 3:10 p. m. the "Selja" stopped her engines.

If these facts are true, it is an *absolute impossibility* that the "Selja" was at a standstill for ten minutes before the collision, or, indeed, at any time before sighting the "Beaver". Upon such a subject a mathematical demonstration is surely far more satisfactory than any other evidence that could be procured, especially where, as in this case, the "Selja's" engines had never been tested to determine how long it would take to stop the vessel (Lie, IV, 1263). And Mr. James Dickie, Mr. Heynemann and Mr. D. W. Dickie all squarely testify



that the "Selja" could not have stopped by 3:15 p. m. They in fact go much further than this and testify that if the "Selja" were making three knots, and her engines were stopped *but not reversed*, she would not be *dead in the water* for about *nine minutes and fifty-two seconds* thereafter, and at the end of five minutes would still have a speed of three-quarters of a knot (II, 365, 413, 435; IV, 1097). Had there been any expert evidence to the contrary it would surely have been procured, yet none was forthcoming, although the record shows that counsel had taken the matter up (III, 1009). The proposition as to when a tramp steamer like the "Selja", of a type known all over the world, can be stopped when going at a certain rate of speed would certainly seem demonstrable with at least *substantial* accuracy. If a vessel like the "Selja", going at six knots at 3 p. m., reducing to three knots at 3:05, and stopping her engines at 3:10, can entirely lose her headway in less than five minutes, while expert constructing engineers say that it would take over nine minutes, how can vessels be built at all with any reliance on the builders? We submit that, while expert testimony has its limits of usefulness, it would be a shattering of all formulas to hold that the "Selja" could have come absolutely to rest in this case before sighting the "Beaver". We do not think that this court will reach a conclusion on this point, which any constructing engineer could prove ridiculous, and which appellee has been wholly unable to substantiate. And it will not do for counsel to say that the experts did not allow for sea and weather conditions, for these conditions in this case favored the "Selja". If the speed of the "Beaver" was, as con-

tended, retarded by an adverse swell, the speed of the "Selja" would in consequence be *accelerated* by a *following swell*. And when we add to these proven facts Captain Kidston's statement before the inspectors that he could not judge whether the "Selja" had headway or not (III, 839), it would seem that appellant has demonstrated as far as could be done the absurdity of the claim that the two whistle rule applied in this case.

Appellee's contention in this matter undoubtedly got its excuse and conception from the translated copy of the "Selja's" log, wherein is found the statement that at 3:10 p. m. the vessel was "*nearly at a standstill*", in connection with certain admissions alleged to have been made by Captain Lie to various parties.

As regards the entry in the log we would say that it amounts to nothing, for the log also shows that from 3:05 to 3:10 the "Selja" was proceeding at a speed of three knots and *she could, therefore, only be* "*nearly at a standstill*" so far as her prior speed permitted her to be (see Lie, IV, 1163). Moreover, when a vessel gets down to a three knot speed, it might well be said as a matter of fact that she was nearly at a standstill (Id. 1161), for she would be going simply at the rate of an ordinary pedestrian.

As to Captain Lie's alleged admissions, we think that they are entitled to very little weight, even if they were made, and such, we submit, is the law.

*Whitney v. The Empire State*, Fed. Case No. 17,586, at p. 1089;

*The Hope*, 4 Fed. 89, 96;

*The Roman*, 14 Fed. 61, 62.

In *The Empire State*, supra, the court says:

“In arriving at this conclusion, I have attached little or no importance to the great mass of testimony introduced in the case, relating to conversation had with the crew of the schooner after the accident. This description of testimony, although often proved in actions for collisions, has, in most cases, been held by the court to be entitled to little weight in determining disputed questions of facts appertaining to the navigation of the respective vessels. \* \* \*”

We do not believe, however, that the admissions in question were made. It is claimed that just after the collision, at a time when Captain Lie was “very nervous” (Ettershank, II, 511), and “wet and shivering” (Kidston, III, 814), he had a conversation with Captain Kidston on the bridge of the “Beaver”, wherein he said that the “Selja” had been at a standstill for over *ten minutes*. It is also claimed that in a conversation with Captain Bulger three days later, he said that he had been stopped for *ten minutes*. As all these conversations relate to a stoppage of *ten minutes*, they obviously were admissions of something *untrue in fact*, for it is admitted by the pleadings that the “Selja” was proceeding at a speed of at least *six knots* up to 3:05 p. m., and these pleadings were drawn long after the alleged admissions were made. It is also exceedingly surprising, if these statements were in fact made, that no reference was made to them at the hearing before the Inspectors either by Captain Kidston or Inspector Bulger, and it is also surprising, if Lie in fact made the statement in question to Captain Bulger, that he should on *the very same day* have testified before

Captain Bulger that he still *had some headway when the "Beaver" was sighted* (Bulger, III, 963-5; Kidston, III, 841-4). It is further surprising that, *after* the alleged admission to Kidston and *before* the alleged admission to Bulger, Captain Lie should have signed his log stating that the "Selja's" engines were not stopped till 3:10 p. m. It is not, however, necessary to raise any issue of veracity on this point. Captain Lie, while denying absolutely that he made the admissions in question, and squarely testifying that his vessel still had headway when the "Beaver" was sighted, states that he *might* have said that he stopped his engines at *ten minutes after three* (Lie, IV, 1271) and, remembering that he is a Norwegian and perhaps did not express himself with facility, his language in the alleged conversations may have been construed as the witnesses for appellee construed it.

As to the testimony of the "Selja's" chief engineer, Mr. Eggen, that in his judgment the "Selja" would stop in two or three minutes, it is of little value unless he had tested the ship and no such test had been in fact made (IV, 1263). Captain Bulger himself practically admits that the master rather than the engineer would have this knowledge (III, 969-970).

Another interesting sidelight on the matter is to be found in appellee's answer in the case, where the following confused and contradictory allegations appear:

"Alleges that the 'Selja' continued on her course without stopping her engines *for many minutes at a high rate of speed* in said fog, to-wit, more than 6 knots per hour, *until she was thereby driven forward to the point where her course crossed the*



*course of the 'Beaver' where she was allowed to stop dead in the water; alleges that she lay at a standstill in the water where she had been thus driven across the course of the 'Beaver' for many minutes, as claimant is informed and believes and therefore alleges, at least five minutes; admits that at 3:10 p. m. the 'Selja's' engines were stopped; alleges that it is ignorant as to how long they had been stopped or as to their speed, if any, between 3:05 and 3:10 p. m., but in that behalf alleges that at 3:10 p. m. the 'Selja' was almost at a standstill in the water."*

(I, 24-25.)

We have to confess our inability to explain how the "Selja" going "*at a high rate of speed*" was driven to a point where she *crossed the "Beaver's" course* and then stopped dead in the water. This allegation is abandoned in the answer in the freight suit, and it is there alleged "*that after the 'Selja' came to be stopped in the water, if such was the fact, the master failed to give a signal thereof*" (IV, 1468). This hardly shows much confidence in the suggested defense.

We submit, therefore, that it is absolutely clear that the "Selja" had not come to a standstill before sighting the "Beaver" and, even if the admissions in question were in fact made, they were wholly untrue in fact. And we again point out that a violation of the two whistle rule can only be established by discrediting in toto the evidence of the officers of the "Selja" that the engines were not stopped till 3:10 p. m. The very most that could possibly be urged by appellee is that there is a *doubt* as to whether the "Selja" had become dead in the water at 3:15 and, in view of the flagrant

and admitted fault of the "Beaver", the law clearly requires that this doubt be resolved in favor of the "Selja". We also submit that, as the "Beaver" failed to hear the *single blast* of the "Selja's" whistle until less than two minutes before the ships came in sight of each other, she would not have heard the two whistle blast any sooner, *and the failure to blow two whistles had absolutely nothing to do with the collision.*

The lower court made no findings as to any violation or non-violation of Rule 15, and it may be that appellee will not in this court adhere to its claim that said rule was violated, *in view of the absolute and manifest inconsistency of this position with the contention that there was a violation of Rule 16.* We, therefore, do not feel called upon to go into the subject further at this time. No findings having been made, the burden is upon the appellee to establish its case as to this alleged fault, and we have said as much as we have on the subject in order that it might not be said that we had entirely ignored it.

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**The Contention (Upheld by the Lower Court) That the "Selja" Violated the Stopping Requirement of Article 16, and That Such Violation Contributed to the Collision Despite the Fact That the "Selja" Was Moving Backwards at the Time. Major and Minor Fault Principle.**

We now come to the really vital questions presented by this appeal. That the "Selja" did not stop her engines on hearing the "Beaver's" first whistle is ad-

mitted, and it is also admitted that she did not stop them on hearing any of the subsequent whistles until 3:10 p. m., *about six minutes before the collision and while the vessels were still about two miles apart.* It is also undisputed, however, that, despite these admissions, the “Selja” was so navigated that, before colliding with the “Beaver”, she had not only become dead in the water but at the time of the collision *she was actually moving backward.* In view of these facts there are presented for determination two important questions, namely:

1st. *When the first and succeeding whistles of the “Beaver” (up to 3:10 p. m.) were heard, was the situation of the vessels such, with reference to danger of collision, as to make Rule 16 applicable?*

2nd. *Admitting either a real or technical violation of Rule 16 by the “Selja”, was such violation a contributing cause of the collision? And herein of the major and minor fault principle.*

It seems to us so clear under the cases that the second question must be answered in the negative, we feel that we could well rest our case on that point alone. However, as we also contend that Rule 16 never became applicable to the “Selja”, we will first take up that branch of the argument, reserving the main question for the last.

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#### IV.

##### **Rule 16 Was Not Applicable.**

As the vessels were over  $5\frac{1}{2}$  miles apart when the “Beaver’s” whistle was first heard, and about 2 miles

apart when the engines were stopped, and as the record makes it perfectly clear that the "Selja" was proceeding at a rate of speed at all of said times which could easily have been overcome so as to have avoided a collision had the approaching vessel been also proceeding at a moderate rate of speed; it is apparent that our distinguished opponents and the lower court disagree with us in our contention that the stopping requirement of Article 16 only becomes applicable where the vessels are within a zone involving *danger of collision*. If there is no danger of collision, as ascertained by the whistles of an approaching vessel, we contend that the rule is not applicable, nor does it become so until such danger exists.

The latter part of Article 16 reads as follows:

*"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."*

It will be noted that the collision rules divide themselves into two general classes: First, those which lay down *general* duties which are *continuous* in their requirements, and, secondly, those which impose special obligations under special circumstances. Article 16 is an admirable illustration of a rule combining both of these classes. Its first provision applies continuously to all vessels navigating in all kinds of fogs, the condition of the weather raising and continuing the requirement imposed by the rule. The second provision applies to that *special circumstance* of danger that arises



through the known presence in the fog of another vessel whose position is unknown.

It will also be seen that in *every* rule requiring special affirmative action the existence of "*danger of collision*" is the only condition which raises the duty to act (see Articles 17, 18, 19 and 20), and the words in Article 16, "*until danger of collision is over*", presuppose danger of collision at the time the engines are required to be stopped.

Bearing in mind the distinction between the general danger of navigating in a fog, covered by the requirement of the rule with reference to moderate speed, and the special danger arising through the known presence of another vessel, whose position is unknown, it is our contention that the duty to stop the engines only becomes imperative at the moment the necessity for precaution arises. This would seem to be the recognized principle governing all the collision rules, based on special circumstances of danger.

In the case of *United States Mail S. S. Co. v. Rumball*, 21 How. 384 (16 L. Ed. 144), decided in 1858, one of the headnotes reads:

"Those engaged in navigating vessels upon the seas are bound to observe the nautical rules in the management of their vessels on approaching a point where there is *danger of collision*."

In the body of the opinion the court said:

"Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other *from the time the necessity for precaution begins*, and continue to be applicable as the vessels advance, so long as the means and oppor-

tunity to avoid the danger remain. They \* \* \* are equally inapplicable to vessels of every description while they are yet so far distant from each other that measures of precaution have not become necessary to avoid a collision."

In *The Nichols*, 7 Wall. 664 (19 L. Ed. 159, 1869) the principle is re-stated:

"Where vessels approaching are yet so far distant from each other, or where the lines of approach though parallel are so far apart as not to involve risk of collision, that rule of navigation has no application to the case.

\* \* \* \* \*

"Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain."

In *Peters v. The Dexter*, 23 Wall. 69 (23 L. Ed. 84), the court said:

"They (the rules) \* \* \* are equally inapplicable to vessels of every description while they are yet so far distant from each other that measures of precaution have not become necessary to avoid a collision."

In *Belden v. Chase*, 150 U. S. 674 (37 L. Ed. 1218, at page 1227) the court, in referring to the rules, again re-states the principle:

"They are not mere prudential regulations but binding enactments obligatory from the time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains. *Peters v. The Dexter*, 23 Wall. 69."

See also

*Fraser v. The Wenona*, 19 Wall. 41 (22 L. Ed. 52) 1874;

*The Breakwater*, 155 U. S. 252 (39 L. Ed. 139, 143) 1894;

*The John King*, 49 Fed. 469, 473 (C. C. A.) 1891.

The same principle has been laid down in England. In the case of *The Banshee*, VI Asp. 221 (Court of Appeal, 1887), Lord Esher said:

“Now at what period of time is it that the regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. *Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them.* They only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. *None of the Regulations apply unless that period of time has arrived.* It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce *risk of collision* within the meaning of the Regulations.”

In line with these cases are also the views expressed at the International Marine Conference when Article 16 was under discussion. Admiral Sampson there said that it should be made necessary to stop “if two ships are approaching *and in danger of collision*” (Vol. I, Protocol of Proceedings, p. 454). And it will be noted that it was the consensus of opinion at the conference that upon hearing the first whistle the vessels would be in close proximity to each other and about two miles apart, which would leave ample time to avoid the collision (Id. Sampson, p. 454; Goodrich, p. 457; Shack-

ford, p. 459). And in a statement by Mr. Goodrich (p. 458) it is assumed that there will be an interval of about six minutes before the vessels meet. *That* was the interval in this case after the "Selja" stopped her engines at 3:10, *although the "Beaver" was covering her share of such interval going at full speed.* We submit that here is strong corroborative evidence tending to show that Rule 16 did not apply to the "Selja" under the circumstances of the case at bar. Captain Kidston of the "Beaver" seems to take the same view (III, 886-7; 894); as also does second officer Ettershank (II, 540-541).

The concluding phrase of Article 16, "*until danger of collision is over*", clearly indicates the soundness of our contention, for it presupposes danger of collision at the time the duty to stop arises. And if the position of the other vessel is "*ascertained*" to the extent of involving no danger of collision "*until the situation changed*" (*The El Monte*, cited *infra*), the duty to stop is not applicable. If that other vessel is found to be so far distant as to involve no danger of collision, the reason of the rule fails, as does the rule itself. Of course, the question of the applicability of the rule is not to be concluded by the mere statement of the master, for every master in such event would be able to excuse himself by testifying that the hearing of the whistle showed no danger of collision. The vital question is whether the master *ascertained* from the whistle that no danger of collision was involved and *ascertained that fact correctly*. If his judgment later turned out to be incorrect, he could obviously not excuse himself, but if his judgment was in



fact correct and there was in fact no danger of collision, and he subsequently stopped his engines while the vessels were yet about two miles in distance and six minutes in time apart, it would be absurd to blindly enforce against him an artificial rule passed with reference to avoiding danger of collision and nothing else.

In this case we contend that, *as a matter of law*, assuming that the moderate speed rule was not being violated, the vessels were so far apart when the "Selja" heard the whistle that the rule did not apply. It will be helpful, however, to determine whether Captain Lie is fact "*ascertained*" the position of the "Beaver" with reference to danger of collision, as he squarely testified (Lie, I, 164, 298-9). And it may also be here remarked that both the first and third officers of the "Selja" were consulted and agreed that the whistle was very far off (Id. 218). Captain Lie's affirmation on this point, as it seems to us, is to be tested by all the surrounding circumstances such as the state of the sea and weather, the existence or non-existence of local noises, the nature of the sound, the means at hand for comparison with other known and located sounds, the speed of his vessel, etc., and also by facts subsequently revealed, such as the subsequent whistles and the distance *actually* separating the two vessels when the first and subsequent whistles were heard.

(1) *State of sea and weather.*

There was admittedly a westerly swell but no wind or sea (see Kidston, III, 870) and the fog was dense. Clearly the absence of wind and sea were favorable con-

ditions, and there is no evidence that the swell was an unfavorable one. As to the fog, we submit that by the better authorities it too is to be regarded as favorable for the *transmission* of sound. Professor Tyndall in his work on "Sound", after most careful and elaborate experiments, states that "*a homogeneous air is the usual associate of fog, and hence the acoustic clearness of foggy weather*" (p. 335).

At the International Marine Conference Captain Shackford, *in expressing his opinion, based on experience, that a whistle can be heard in a fog farther than in clear weather*, asked for the opinion of the others. In reply the delegate from Great Britain, Admiral Bowden-Smith, said:

"Mr. President, in answer to the delegate from the United States, I would like to say that *I agree with him*, and that in my opinion, and I have very often heard it, *the sound of a steam-whistle can be heard at a greater distance in a fog than it can in clear weather*. I would like to add one more remark on the difficulties experienced by the delegate from Norway in *locating* sounds. I know that this difficulty is made a great deal of among sailors, but I have not found that difficulty in locating sound in a fog. I have served a great deal in fleets, in my younger days; and, as you know very well, the ships often get scattered, and all that sort of thing. I would hear the whistle of the vessel in the fog, and when the fog lifted she would be where I supposed she was. I can say, for myself, that I do not find that great difficulty in locating sound in a fog which some people seem to find" (p. 459).

## (2) *Non-Existence of Local Noises.*

The evidence of Captain Lie shows that there were no local noises (I, 162). The speed of the ship at six knots

gave no vibrations that could be heard or felt on the bridge (Id.). In fact the situation was so placid that the captain said he could hear the noise made by the seagulls as they rose from the water alongside the ship (Id. 171). Furthermore, it would seem from the testimony of Second Officer Larsen that the "Beaver's" first whistle was heard by him while he was *on the poop taking soundings*, and he heard not only the first but every succeeding whistle up to the time of the collision. For all practical purposes, therefore, the upper parts of the vessel were as free from local noises as though she were dead in the water, and this circumstance, together with the condition of sea and weather, made the situation ideal for hearing and locating sound.

### (3) *The Nature of the Sound.*

Captain Lie on the "Selja's" bridge described the first sound heard as deep, faint and far away (I, 162). There was no mistaking its bearing as being practically right ahead, or its distance as being far off. In fact, it sounded so distant and faint that, for the moment, the fog siren at Bonita Point came to the master's mind,—Bonita Point was then known to be over twenty-five miles away,—and while, perhaps, this was not a very serious thought, still it led the master, upon hearing the second or third whistle, to time the intervals between those that followed. The first whistle was heard to blow during a space of time that did not materially differ from the duration of the succeeding whistles, and if, as matter of fact, it blew for a period of five seconds, then Captain Lie, under the most favorable conditions, heard that first deep, faint, sound for five seconds.

#### (4) *The Means of Comparison.*

The siren at Point Reyes was first heard by the "Selja" at about 2:30, when it was two and one-half miles away, and the very first whistle sounded loud and clear, showing that the "Selja" had just entered, from the northward, the sound zone of the whistle. This siren continued to be heard loud and clear every thirty-five seconds up to the time of the collision. Here then was the situation:

*The "Selja" was and had been proceeding in the presence of a geographically fixed point, whose bearing and distance, at the time the "Beaver's" first whistle was heard a minute or two after 3 o'clock, were known with nearly the exactness that it would have been had it been visible. Hearing this land siren at 3 o'clock loud and clear, bearing due north a distance of  $1\frac{7}{8}$  miles, and immediately afterwards hearing the "Beaver's" first whistle for five seconds, deep, faint and far away, can it be doubted that Captain Lie, under such circumstances, could hardly have been better conditioned in passing sound judgment upon the distance of the "Beaver's" whistle being such as not to involve danger of collision? All of Captain Lie's prior and subsequent maneuvers during that fog show most careful navigation, and yet he says that thought of danger of collision never even suggested itself to his mind at the time of first hearing the "Beaver", and that had there been the slightest doubt as to her position, he would certainly have stopped the "Selja's" engine, not that he might hear better but because he would have been in doubt.*



For the court's assistance in further testing the judgment of Captain Lie, it is entirely proper to consider the situation as affected by facts subsequently revealed.

(a) *The Distance Separating the Two Vessels.*

The first in importance of these is the question of the *actual* distance separating the two vessels at the time the first whistle was heard.

We have already, in discussing the subject of the "Beaver's" speed, said much that bears upon this point, and, if the court has adopted our contention that that vessel's speed was approximately 15 knots per hour, then it must be held that at 3 o'clock the two vessels were 4.83 knots, or 5.56 statute miles, apart (Lie, I, 192; Libellant's Ex. No. 1).

"Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them".

*The Banshee*, supra.

(See also Kidston, III, 894.)

(b) *The Succeeding Whistles.*

Another matter proper for the court to consider would be the succeeding whistles of the "Beaver". These, as bearing upon the master's judgment of the first whistle, are of importance. It will be first noted that every succeeding whistle was heard, and at such exact intervals as to lead the "Selja's" master to almost immediately start timing the intervals to clear up his transitory thought about Bonita Point. Having definitely settled the question that the whistles came from a steamer, it

was also by the same operation of timing clearly made manifest that the *course* of the steamer was towards the "Selja" and, when this was ascertained, the engine was stopped, not because of the rule, but in obedience to good seamanship and cautious navigation (Lie, I, 170). And even then no thought of collision was present in Captain Lie's mind, for these succeeding whistles gave accuracy to his knowledge of the distance separating the vessels. His vessel had been proceeding at slow speed (3 knots) for five minutes, when his engine was first stopped, and he knew from the sound of the approaching whistles that there would be no difficulty in avoiding contact with the ship after she should be sighted. And as proof of his good judgment, the "Selja" is shown to have been almost at rest the moment the "Beaver" came in sight.

Some of the cases have applied Article 16 to vessels stopping their engines at the *second* whistle. This might seem to point to the strictness with which the rule is enforced, but we submit such cases rather show that in the circumstance of stopping at the second whistle is found clear proof of the applicability of the rule, for it is hopelessly contradictory to say that a *first* whistle reveals *certainty* of position, with reference to danger of collision, while the *second* reveals uncertainty. The ratio of certainty increases and does not decrease through hearing succeeding whistles. Succeeding whistles may well *verify* the master's judgment as to the position shown by the first, but, in such whistles refuting his judgment, there is found satisfactory evidence of the applicability of the rule.

In considering the meaning of the words “*not ascertained*” as used in Article 16, the court in *The Bernhard Hall* case (IX Asp. 300) said:

“ \* \* \* it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. When whistle after whistle is heard the position is ascertained \* \* \*.”

Considering the “Selja’s” then present environment and means of ascertainment, together with the subsequent *verifying* facts, we submit that the master’s judgment that the rule did not apply should be upheld. And even if the testimony of Captain Lie and these facts are sufficient to raise a *doubt* as to the applicability of Article 16 at the times the whistles of the “Beaver” were heard, then, in view of the gross faults of the “Beaver” already set forth, that doubt should be resolved in favor of the “Selja”.

In reversing the judgment of the District Court dividing damages between a tug and steamer, the Circuit Court of Appeals for the Fourth Circuit said:

“The only fault charged against the tug is the failure to blow a passing signal, *as required by Rule 6*, when passing ‘head and head’, or when vessels pass within half a mile of each other. The master of the tug says he did not give the signal because he *did not consider the steamship to be within a half mile distance*.

*If the testimony on this point is sufficient to raise a doubt as to whether Rule 6 was applicable, this will eliminate every possible ground upon which the tug could be held liable.*

‘Where a fault is charged against one vessel in relation to which the testimony is doubtful, and there is undisputed testimony as to the fault of the

other, which is flagrant, the former vessel will not be charged with contributory negligence. *The Manistee*, 7 Biss. Fed. Cas. No. 9028'."

*The Lord O'Neil*, 66 Fed. 77.

The court, in the *Manistee* case, further said:

"A court will not find the other party in fault upon doubtful evidence when it can lay its hands upon a flagrant wrong and say that that, at any rate, was mainly the cause of the injury sustained."

We do not propose to go into the English cases construing Article 16 for the reason that such cases were decided with a view to another English statute, to be referred to under our next heading, which makes the decisions wholly inapplicable in the United States. We venture to remark, however, that none of the English cases, except possibly that of *The Britannia*, 10 Asp. 67, are, on their facts, inconsistent with the views herein expressed. All of the other cases, English and American, dealing with the latter part of Article 16, are, so far as we can find, cases where the alleged violation of the rule happened but a few moments before the collision, and in each case danger of collision was obviously imminent. None of them deal with a situation similar to that in the case at bar, to wit: where the first whistle was heard more than fifteen minutes before the collision while the vessels were nearly six miles apart. To say that the rule applies under such extreme circumstances, so obviously not meant to be covered, would be to put an intolerable burden upon navigation and to carry the matter to absurd limits. As to the case of *The Britannia*, we be-



lieve that it lays down a harsh doctrine which should not be followed, but the case itself can be readily distinguished in that the "Brittania" was clearly in fault *in resuming her speed in the face of danger of collision* and was moving ahead when the collision occurred.

We now proceed to a brief consideration of some of the American cases coming under the rule since it became legislatively effective in this country July 1st, 1897.

*The El Monte*, 114 Fed. 796 (D. C.), Adams, J.  
(Decided March 4, 1902.)

Both vessels were held to have been going at an immoderate rate of speed up to within two or three minutes of the collision

"in a frequented part of the ocean and in a fog of such density that they could not discover each other until they were within a distance of about five hundred feet."

Both also were held to have violated the second part of the rule in not stopping on hearing the first whistle, and the court in speaking of this part of the rule, said:

"The object of this section of the article, providing an additional precaution against collision, was obviously to prevent vessels from approaching each other *closely* in a fog—not, perhaps, requiring vessels to stop when so far away from each other that no danger actually existed, or could exist, until the situation changed, but in all doubtful cases requiring an immediate stoppage of the vessel for the purpose of a better hearing, to get the vessel's headway fully under command, and to cause all on board to be on the alert to provide for contingencies."

*Dunton v. Allan S. S. Co.*, 119 Fed. 590 (C. C. A.)  
3rd Circuit. (Decided January 15, 1903.)

This was a collision during a thick fog between a schooner and a steamship. In the *lower court* the syllabus in part reads:

“Each heard the fog signal of the other, and *the steamer at once slowed down to a moderate speed and proceeded with caution \* \* \**”

The *district judge*, in his opinion, said of the steamer:

“She had already *slowed down* upon hearing for the first time the fog signal from the schooner, and this I think was her full duty. As the Supreme Court of the United States has said in the *Ludvig Holberg*, 157 U. S. 68, 15 Sup. Ct. 477, 39 L. Ed. 620, ‘no case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger’. Clearly there was no such indication in the present case, and the steamship was not in fault therefore in doing no more than *slowing down to a moderate speed and thereafter proceeding with caution.*”

Further on in the opinion the lower court uses this expression:

“\* \* \* and the steamship had *slowed her speed* at the first intimation of danger, and thereafter proceeded with due caution.”

The District Court’s judgment was affirmed by the Circuit Court of Appeals, where it is said (p. 592):

“A careful review of the testimony convinces us that, on both vessels, the requisite care, under the circumstances, was taken to avoid accident, and that the collision was an unavoidable accident, for which no fault should be imputed to either vessel. In this, we agree with the opinion of the learned judge of the court below, when he says:

‘The testimony satisfies me that, as soon as the vessels came in sight of each other, everything that was possible was done upon the steamship to avert the threatened disaster. *She had already slowed down upon hearing for the first time the fog signal from the schooner*, and this, I think, was her full duty. As the Supreme Court of the United States has said in *The Holberg*, 157 U. S. 68, 15 Sup. Ct. 480, 39 L. Ed. 620: “No case has ever held that a steamer was obliged to stop at the first signal heard by her, unless its proximity be such as to indicate immediate danger.” Clearly there was no such indication in the present case, and the steamship was not at fault, therefore, in doing <sup>no</sup> more than slowing down to a moderate speed, and thereafter proceeding with caution. \* \* \* Neither vessel, I think, was moving through the fog at a negligent rate of speed. The schooner’s sails were all drawing, but the wind was so light that, as I have already said, she was not moving faster than two knots an hour, which gave her little more than steerage way; and the steamship had *slowed her speed* at the first intimation of danger, and thereafter proceeded with due caution.’ ”

Judge Hough in the case of *The Georgic*, to be referred to later, says that he sees nothing in *Dunton v. Allan S. S. Co.* opposed to *his* construction of Article 16,

“for in that case it plainly appears that the engines of the steamship were ‘*stopped immediately*’ upon hearing the first sound signal of the vessel with which she afterwards came in collision.”

The warrant for this erroneous statement of Judge Hough’s is to be found in the Circuit Court of Appeals’ opinion in the *Dunton* case at page 591, where, referring to the *testimony* of the officers of the steamer, it is said:

“Their testimony is \* \* \* that the first signal which was one of two blasts heard from the schooner

was just *a few seconds* before she loomed in sight through the fog; that immediately upon hearing these whistles a signal was given to the engineer to stop \* \* \* .”

It will be noted that this statement found in the Dunton case is not a statement of the court’s finding, but merely a statement of what some of the witnesses testified to. The finding was as has been shown by the District Court decision, and this finding was affirmed by the Circuit Court of Appeals. Furthermore, the head-note of the Dunton case in the Circuit Court of Appeals, reads:

“On hearing the fog signal of the schooner the steamer, which was then quite close, at *once slowed down* and proceeded with caution \* \* \* .”

From the foregoing it will be seen that there is no basis for Judge Hough’s statement.

*The Belgian King*, 125 Fed. 869 (C. C. A. 9th Circuit). (Decided October 19, 1903.)

This case, recognizing the *limitation* in Article 16 on the duty to stop, decided by this court, will be discussed at a later point in our brief.

*The Commonwealth*, 174 Fed. 694, Adams, J. (Decided July 15, 1910.)

This case also recognizing the *limitation* in Article 16, on the duty to stop, we will refer to later under the next heading.

*The Georgic*, 180 Fed. 863, Hough, J. (Decided May 31, 1910.)

This is a case in which the stopping requirement of Article 16 is strictly construed and enforced. The



Finance was held at fault for being on the wrong side of the channel, and both vessels at fault for disregarding the latter part of Article 16. Both vessels were in charge of licensed pilots, and, after reviewing their respective statements, the court said:

*“It is thus positively asserted by both pilots that each distinctly heard forward of his beam the fog signal of a vessel, the position of which was not ascertained.”*

The court says of the statement made by the Supreme Court in *The Ludvig Holberg* case as to the lack of necessity of a vessel to stop on hearing the first whistle: “Undoubtedly that was the rule under the International Regulations of March 3, 1885, *Article 13*.” This, we submit, is faulty criticism for Article 13 referred to was the moderate speed rule and had nothing to do with the question. It was *Article 18* of those rules that applied to the duty to stop (*The Umbria*, 166 U. S. 404; 41 L. Ed. 1053; *The Grenadier*, 74 Fed. 975). Again, the court says that Article 16 of the present rules, in decisions binding on it, has been construed as it construes it with reference to the duty to stop on hearing the first whistle, but we fail to find any such decision cited by the court. Its reference to *The St. Louis* (to be referred to by us later) is not in point on this subject, for the sole question decided in that case was that the Delaware, *admittedly having violated Article 16*, had failed to show that such violation had not contributed to the collision, and the court said that on the authority of *The Umbria* case, if the Delaware had *succeeded* in showing that she was reversed and going backward at the time of the col-

lision, she would not have been held liable for having violated the rule. This unmistakable approval of *The Umbria* case by the Circuit Court of Appeals for the Second Circuit in construing Article 16 makes strongly for the contention that the rule of *The Ludvig Holberg*, criticized by Judge Hough, also found approval, for the court in *The Umbria* case went even farther than it did in *The Ludvig Holberg* case, for it said:

“We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead”;

while, in the former decision, we find added the qualifying expression: “*unless its proximity be such as to indicate immediate danger*”.

The test recognized by our courts on the duty to stop laid down by Article 16 is not *the bare hearing of a first whistle*, as suggested by Judge Hough, but the hearing of one whose position is not ascertained, *with reference to its involving risk of collision*. This test, instead of destroying, supports the applicability of the rule of *The Ludvig Holberg*. Furthermore Judge Hough’s reference to *Dunton v. Allan S. S. Co.* is, as we have shown, clearly incorrect as supporting a view that Article 16 calls imperatively for the stoppage of the engines on hearing the first whistle, *for the rule of the Ludvig Holberg case is expressly adopted in that case*. It would, therefore, seem that the Circuit Court of Appeals for both the Second and Third Circuits differ from the test as laid down by Judge Hough and some of the English cases which he seemed to follow.

*The Minnesota*, 189 Fed. 706. We believe that this case, the latest on the subject, is a strong one in our favor but it can be best dealt with under our next heading as to contributory negligence. We shall also deal under that heading with the case of *The Admiral Schley*, 142 Fed. 64, as well as with certain other cases of some applicability.

Taken all in all, we believe that the American cases not only do not conflict with the principle for which we contend, but that they lend very decided support to that principle. We submit that, if vessels are so far apart that no danger of collision exists, Article 16 does not apply. We also contend that if the master ascertains this fact, *and ascertains it correctly*, then the position of the vessel is "*ascertained*" within the meaning of the rule. And we finally submit that, if there is doubt as to whether the rule applied, that doubt, under the circumstances of this case, must be resolved in our favor. We believe that the foregoing discussion will be of assistance in the consideration of the last and most vital point in the case, to which we now turn.

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## V.

**Even if There Is Found to Have Been Either a Real or Technical Violation of Article 16 by the "Selja" the Violation Was Not a Contributing Cause of the Collision. Major and Minor Fault Principle.**

In considering this, the most vital phase of the case, the court should bear in mind the following facts:

1. That the “Beaver”, grossly in fault through the violation of several statutory rules, ran into and sank the “Selja”.

2. That the “Selja” stopped her engines six minutes before the collision, while the vessels were still about two miles apart, and at the time of the collision was moving backwards.

If these undisputed facts are clearly borne in mind we believe that the court will find it impossible to say that the “Selja” in any way contributed to the collision. In treating this subject we shall first endeavor to distinguish all of the English cases. We shall then discuss certain American cases, and apply them briefly to the case at bar. We shall then finally refer to and analyze fully a case recently decided by this court which we believe to be squarely in point and to be decisive in favor of the “Selja”.

Following out the foregoing general arrangement, we first call the court’s attention to *the reason* for a very clearly marked distinction between the American and English cases on the subject of contributory negligence and the correlative subject of burden of proof in collision cases.

An examination of the English decisions under Article 16 will disclose that in nearly every case a violation of the stopping provision of the rule has been held condemnatory of the offending vessel.

*The Cathay*, IX Asp. 35 (1899);

*The Rondane*, IX Asp. 106 (1900);

*The Bernhard Hall*, IX Asp. 300 (1902);



*The Koning Wilhelm I*, IX Asp. 425 (1903);  
*The Britannia*, X Asp. 65 (1904).

The obvious reason for the marked distinction between the decisions of this country and England is to be found in the fact that in the latter country a statute expressly provides that:

*“Where, in a case of collision, it is proved to the court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from this regulation necessary.”*

57 and 58 Vict. C. 419 (4) (1894).

This statutory rule is cited by Marsden in his late work on Collisions (6th Ed.) in his second chapter entitled: *“Statutory Presumption of Fault”*. In it he goes into the similar regulations which preceded and led to the statute in question, including the regulation discussed in the case of *The Fannie M. Carvill*, L. R. 13 App. Cases 455, cited by our opponents in the lower court. It is submitted that these regulations are the cause for the adoption of the “but for” or *sine qua non* rule in England, as is made perfectly clear by Marsden’s discussion of Rule 16. Thus, after citing the article in full, he says:

*“This article demands the careful attention of seamen, as a failure to stop the engines under the circumstances mentioned will bring the vessel within the terms of 57 and 58 Vict. C. 419, and almost certainly cause her to be held in fault in case of collision.”*

Marsden, p. 372.

It is, therefore, a statutory rule which makes the "but for" rule applicable in England. There is no such statute in the United States and hence the "but for" rule does not apply here, except in such cases as *The Pennsylvania* (19 Wall. 125; 22 L. Ed. 148), where the violation of the rule was an actuality "*at the time of the collision*".

Before 57 and 58 Vict. and the regulations preceding it went into effect, the English law was like our own, namely: that an anterior act of negligence by one party would not bar his full recovery if, notwithstanding his prior negligence, the other party could have avoided the collision. This is made clear by Marsden's first chapter. Thus on pp. 17 and 18 he says:

"But it is clear that there is no difference between the rules of law and of admiralty as to what amounts to negligence causing collision; and that before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved. Thus, in *Cayzer v. Carron Co., The Margaret*, a vessel *infringed a statutory rule of navigation*, which required her to wait under a point in the river until the other ship passed, and was in this respect guilty of negligence; *and without that negligence*, other circumstances being the same, *the collision would not have happened*; yet it was held that this negligence *was not a cause of the collision*. \* \* \* In *The Margaret* the one ship was held to be in fault, because with ordinary care she could have avoided a collision, notwithstanding the negligence of the other; and it was for this reason that the negligence of the latter was held not to be a cause of the collision. So in *The Monte Rosa*, a tug by her own fault steered a course which brought her into collision with the

anchor of a steamship which the latter was, *contrary to the Thames rules*, carrying over her bows not stock awash, and was holed by the anchor. It was held that, since the tug could with ordinary care have kept clear of the steamship, she was *alone* in fault, and could recover nothing. The Lord Saumerez, an early case, is to the same effect. There a vessel recovered full damages, though *in a fog* she was carrying too great a press of sail and was proceeding at too great a rate of speed. The decision proceeded upon the same grounds—that the defendant could with ordinary care have avoided the collision, notwithstanding the negligence of the plaintiff.”

Marsden then goes on to distinguish certain other cases and says on p. 19:

“Many admiralty cases have been decided without sufficient consideration of the question whether the negligence found against each ship was negligence *contributing to the collision*.”

It will be noted that the English cases cited are cases of the violation of *statutory rules*, yet the vessel guilty of such violation was held *not to have contributed to the collision* and the “but for” rule was discarded. In the case of *The Fenham*, L. R., 3 C. P. 212, Lord Romilly gave utterance to expressions somewhat inconsistent with the cases in question, but Marsden clearly distinguishes that case.

Marsden, pp. 16, 18.

And in *Cayzer v. Carron Co.*, supra, 9 App. Cases, 873, 881-3, Lord Blackburne says:

“Now upon that there must always be a question whether or not, if there is neglect shown of any rule, that neglect is the cause of the accident.

Upon that the case of *The Khedive* has been referred to. In that case *the rule was by statute* and it was enacted positively that if the rule was not obeyed, the breach of it should in itself be deemed to be blame. *When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been the cause of the accident to some extent.* \* \* \* I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule was in itself sufficient *unless it was an occasion of the accident.* \* \* \* The only case I am aware of which seems to point to there being any difference between the rules of Law and of Admiralty is the case of *The Fenham*, where there are expressions used by Lord Romilly, then Master of the Rolls, which seem to point to his having thought that the burthen should lie upon those who infringed a rule to show that the infringement was not the cause of the collision. Now I am not at all sure that with proper qualifications that would not be a fair enough rule when applied to such a thing as a collision at night when there was an absence of lights. But when you come to apply it to such a case as this and say that it is shown that the *Clan Sinclair* and the *Clan Sinclair's* people are blameable for this loss \* \* \* because the *Clan Sinclair ought to have eased and waited sooner*, I do not think it follows, as a reasonable rule of evidence, to say that that occasioned the accident unless the *Clan Sinclair* can show that it did not occasion the accident."

In that case the *Clan Sinclair* violated a statutory rule and without that violation no collision would have occurred (see opinion, p. 883), yet she was held blameless.

It will thus be noted that *before* 57 and 58 Viet. and the statutes preceding it, creating a statutory presump-



tion of fault, the rule of the English Admiralty was the same as that of the common law on the subject of contributory negligence and the "but for" rule did not apply. And the leading English case of *Davies v. Mann*, 10 M. & W. 546, has been repeatedly referred to in admiralty on this subject (Marsden, pp. 16-20). In that celebrated case the plaintiff left a donkey unlawfully on the highway and defendant ran over it. Parke B. said:

"Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there. \* \* \*"

We cite this language for the reason that it seems directly applicable to the case at bar, if we assume that the "Selja" did technically violate Rule 16.

Counsel in the lower court contended, however, that the English statutes in question do not lay down "any rule at all as to *liability* or *causation*" and that, although the statutes say that the vessel "shall be deemed in fault", they nowhere say that the fault will be deemed "*to have contributed to the collision*", and they there cited English cases showing that if the fault "could not by any possibility have contributed to the collision" the vessel would not be held liable, despite the statutes. This is the "but for" rule, however, and it is *because of these statutes* that that rule is laid down. This point is well illustrated by the case of *The Fannie M. Carvill*, L. R., 13 App. Cases 455. The actual decision in that case was that where a ship infringed Article 3 of the sailing regu-

lations by carrying her sidelights with screens shorter than the length prescribed thereby, and it was proved that such breach of the regulation could not possibly have contributed to the collision, she could not be held liable for damages. The case turned upon Section 17 of the Merchants Shipping Act of 1873 reading as follows:

“If, in any case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in, or made under, the Merchants Shipping Act, 1854 to 1873, have been infringed the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary.”

It was contended that this statute made a ship violating the regulations liable, even though such violation did not contribute or could not possibly have contributed to the collision. *The court said that obviously under this statute mere proof that the infringement of the regulation did not in point of fact contribute to the collision was inadmissible, as the legislature intended to obviate the necessity for the determination of such question of fact upon conflicting evidence.* The court also said, however, that if it could be proved that the violation of the regulation could not, by any possibility, have contributed to the collision, as it was proved in the case in question, then the statute did not apply. In denying the contention that the vessel must be held liable in any event, the court said in part:

“It would, in fact, make the vessel guilty of the infringement, a sort of outlaw of the seas, by de-

priving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled."

It thus appears that this case is far from being an authority against the appellant and is a very forcible authority in his favor for the court holds that, *because of the statute in question*, the burden was thrown on the party violating the regulation to show that the violation could not *by any possibility* have contributed to the collision,—thus clearly implying that but for the statute it would be enough to show that the violation did not in fact contribute to the collision.

This case makes it clear beyond question that the English statutes in question *do* deal with the rule of *liability* or *causation* and bring into force the "but for" rule. And in the citations already made from *Marsden on Collisions*, it is clear that these statutes have been the real reason for the English decisions under Article XVI.

Marsden, p. 372, quoted *supra*.

The difference made in the law by the English statutes is strikingly illustrated by the case of *The Britannia*, 34 Fed. 557, where a vessel violated a statute in being in the wrong part of a channel. On this subject Judge Brown said:

"Neither of these statutes has any sanction annexed to it. It is *not* declared that any vessel going in the wrong part of the river shall be deemed in fault. \* \* \* Aside from some special provisions making the non-observance of the statute in itself a ground of liability, as in the British Act above

referred to (the Act of 1873 cited in the *Carvill* case), the mere transgression of such a statute will not make the vessel liable where the disobedience of it did not contribute to the collision. And in as much as *only proximate causes of collision are deemed material*, the mere fact that a vessel is on the wrong side of the river does not make her liable, if there was ample time and space for the vessels to avoid each other by the use of ordinary care."

It is true that the American cases following the rule of *The Pennsylvania* (supra) attach a presumption of fault to a vessel in violation of a statutory rule "*at the time of the collision*", but they go no farther than this, and no case can be found under Article 16 where a vessel moving astern at the time of the collision was held liable.

We submit that the statutes referred to clearly distinguish the English cases, in so far as they deal with the subject of contributory negligence, and it remains only to take up the American cases. In doing so it will be appropriate and consistent to consider jointly with this subject of contributory negligence the equally well known *major and minor fault principle*, so often applied in collision cases, many courts holding that where there is doubt as to the contributing character of a fault that doubt will be resolved against the vessel whose fault is shown to be flagrant and in itself sufficient to account for the collision.

As has been intimated, we are familiar with the rule laid down in the case of *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148, and have no fault to find with it, but its



application, as we shall now show, does not reach the case at bar. If the time at which the alleged fault of the "Selja" was committed does not bear some reasonable connection with the time of the collision, or if the faults of the two vessels are out of all proportion to each other, then, we submit, the rule as to burden of proof laid down in *The Pennsylvania* does not apply. Judged from either of these tests, the rule does not reach the "Selja", for it is perfectly clear that at the time of the collision in this case, and for six minutes before it, the Norwegian boat was not in the actual violation of a statutory rule intended to prevent collisions. The time of the "Selja's" non-compliance with Article 16 is confessedly fixed as at periods long before the collision, and under such circumstances, as the faults of the "Beaver" were flagrant and sufficient to account for the collision, and as the "Selja's" failure to stop her engine at such times bears so small a proportion to such faults, then, we submit, the burden of proof is upon the appellee to show that the "Selja's" alleged prior error had some probable connection with the immediate acts of the "Beaver" that produced the injury. Furthermore, we submit that where one fault is gross and the other slight, the latter bears so little proportion to the former that it would seem but fair that the more pronounced offender should have the burden of showing that the prima facie discrepancy in the faults does not represent the real situation. We shall now cite some of the cases bearing on these points:

In *The Lord O'Neil*, 66 Fed. 77 (C. C. A. 4th Circuit, 1895), the court said:

“The only fault charged against the tug is the failure to blow a passing signal, as required by Rule 6, when passing ‘head and head’, or when vessels pass within half a mile of each other. The master of the tug says he did not give the signal because *he did not consider the steamship to be within a half mile distance.* \* \* \*

If the testimony on this point is sufficient to raise a *doubt* as to whether Rule 6 *was applicable*, this will eliminate every possible ground upon which the tug could be held liable. ‘Where a fault is charged against one vessel in relation to which the testimony is doubtful, *and there is undisputed testimony as to the fault of the other, which is flagrant*; the former vessel will not be charged with contributory negligence. *The Manistee*, 7 Biss. Fed. Cas. No. 9028.’

But we will not let our position rest upon so narrow a margin. If it be true, as found by the District judge, that the steamship was ‘grossly in fault’, and if it be true, as we find, that the immediate cause of the injury was the inexplicable and culpable change of course by the steamship after she came abreast of the tug, the omission to blow the passing signal bears so little proportion to the flagrant faults of the steamship and contributes so little to the disaster, that it is not entitled to consideration.

The proximate cause of the injury is the first and main question to be determined in fixing and apportioning the liability, and finding, as we do, that the immediate cause of the collision was the change of course after the tug was passed, the misconduct of the steamship is not alleviated by proof of some omission to do an act which *had no direct connection with such misconduct.* Where fault is clearly shown on one side full proof should be required to shield from liability the party guilty of such fault, and it should appear that the alleged contributory negligence had, or probably might have had, something to do with *the act which produced the injury.*”

This view of slight fault is taken by the Supreme Court in many cases, as, for instance, in the case of *The Grace Girdler*, 7 Wall. 196 (19 L. Ed. 113), where the court said:

“If there was an omission under the circumstances it was an error and not a fault. In the eyes of the law the former does not rise to the grade of the latter and is always venial.”

In *Ralston v. The State Rights*, Fed. Case No. 11,540, the court, in speaking on this subject of mutual fault, said:

“It is contended that, where both parties are in fault, the damages must be shared. Jac. Sea Laws 328. I presume the plain meaning of this is that they were both in fault *at the time, and in the acts which produced the injuries to both*, and not that one of the parties had, on a previous occasion, been in fault with the other. I should offer another modification to the generality of this rule in cases where the faults are egregiously unequal; for a slight fault on one side would not justify a destructive retaliation on the other, even *at the same time*.”

In *The Europe*, 175 Fed. 596, Wolverton, J., holds the Europe to have been in violation of several statutory rules with reference to her lights, but holds that none of them were shown to be contributing causes. The court said:

“ \* \* \* a vessel in collision is presumed to be in fault *if at the time* it was acting in violation of statutory rule intended to prevent the occurrence. The presumption, however, is a disputable one which should be, and is, overcome by competent proof that such unlawful action could not have been the cause of the collision.”

In recently affirming this decision this court said:

“A harmless fault, *even when a positive mandate of a statute has been disobeyed*, cannot be made a basis for the recovery of damages in a civil suit, nor palliate the fault of another which does inflict an injury.”

Id., 190 Fed. 475, 481.

In *The Great Republic*, 23 Wall. 20 (23 L. Ed. 54) the court said:

“The Cleona did not blow her whistle for each boat to keep to the right as soon as she started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think that under the circumstances the Cleona should share the consequences of this collision with the Republic.”

In the case of *The Athabasca*, 45 Fed. 651, it is said:

“*It being established that the negligence of the libellant was the inducing cause of the collision and loss, the charge of accessory negligence on the part of the respondent as the foundation for compelling it to share the damages must be clearly made out.* In this the authorities all agree. *The Comet*, 9 Blatchf. 323; *The Sunnyside*, Brown, Adm. 247; *Taylor v. Harwood*, Taney, 444; the *E. B. Ward, Jr.*, 20 Fed. 702; the *Catherine*, 2 Hawg. Adm. 145; *The St. Paul*, per Brown, J., E. Dist. Mich. not reported. The damages are not divided if the fault of one be slight, bearing but little proportion to the fault of the other. *The Great Republic*, 23 Wall. 20.”

See also

*Pierce v. J. R. P. Moore*, 45 Fed. 267;

*The Clarion*, 27 Fed. 128.

In the case of *The Victory*, 168 U. S. 410 (42 L. Ed. 519) the head note reads:



“Where a vessel is clearly in fault for a collision the evidence, to establish the fault of the other vessel, must be clear and convincing in order to make a case for apportionment of damages.

“The burden of proof is upon each vessel in case of collision to establish fault on the part of the other.”

In *Alexandre v. Machan* (“The City of New York”), 147 U. S. 72 (37 L. Ed. 84), it is said:

“In view of the recklessness with which the steamer had navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to this claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.”

This rule laid down by the Supreme Court in *The City of New York* has been expressly cited and followed by the Circuit Court of Appeals for the *Second and Sixth Circuits* in numerous cases, as for instance:

*The Mexico*, 84 Fed. 504, 505 (C. C. A. 2nd C.);

*The Newburgh*, 130 Fed. 321, 324 (C. C. A. 2nd C.);

*The Australia*, 120 Fed. 220, 224 (C. C. A. 6th C.);

*Lake Erie Transp. Co. v. Gilchrist Transp. Co.*, 142 Fed. 89, 97 (C. C. A. 6th C.).

In *The John H. Starin*, 122 Fed. 236 (C. C. A. 2nd Circuit), the schooner Gurney, anchored in the harbor

of New Haven on the night of October 18, 1900, was run into by the side wheel passenger steamer John H. Starin and sunk. In the suit brought against the Starin, she was charged with not keeping on the right hand side of the channel in violation of the statutory rule; with not keeping a proper lookout and with excessive speed. The Gurney was charged with not keeping a proper light as required by the rule for vessels at anchor. The lower court found for the libelant and held the Starin solely at fault. This judgment was reversed by the Circuit Court of Appeals, which held that the Gurney was at fault in not having a light and that the fault was the proximate cause of the collision. The court said:

“Having thus found sufficient cause for the collision it is not necessary to pursue the discussion further. The Gurney’s negligence having been clearly proved, it is necessary for her to establish the Starin’s fault by proof of equal cogency. The City of New York, 147 U. S. 72, 85; 13 Sup. Ct. 211; 37 L. Ed. 84.”

In *Long Island Ry. Co. v. Killien*, 67 Fed. 365 (C. C. A., 2nd C., 1895), we have another case of the actual violation of a rule. The court said:

“Doubtless the Garden City was not being navigated as near as possible in the center of the river, *as the terms of the state statute, applicable to the East river required*, but this, as we have frequently had occasion to decide, should not condemn her for the consequences of a collision, which, notwithstanding her presence there, would not have occurred if the other vessel had exercised ordinary care to avoid it. Only such vessels can invoke the violation of the statute as an actionable fault *as have been prejudiced by it*, either because *their own movements have been embarrassed* by the presence of the

offending vessel, or because they have omitted to take some precaution in ignorance of her presence which they might otherwise have avoided danger by adopting."

Referring to what the master of the Garden City did, the court said:

"He deliberately chose a course which, in his judgment, at the time was sufficiently outside the tug's course to be a safe and prudent one. We think his judgment formed under such circumstances was not a rash one, or one which should be pronounced erroneous merely because subsequent events have shown that there would not have been a collision if he had pursued a course further to port. \* \* \*

"There are circumstances under which one person ought to foresee and provide against the negligence of another; but ordinarily an act, though negligent, is not the proximate cause of an injury, when but for the intervening negligence of another the injury would not have been inflicted."

*Long Island Ry. Co. v. Killien* is cited with approval on this point in *The Lowell M. Palmer*, 142 Fed. 937 (C. C. A. 2nd Circuit).

In the following cases, also, vessels were held not liable *even though either state statutes or rules of navigation were violated*:

*The Buckeye*, 9 Fed. 667;

*The Maryland*, 19 Fed. 551, 556;

*The E. A. Packer*, 20 Fed. 327, 329;

*The Clara & Reliance*, 55 Fed. 1021, 1023;

*The Obdam*, 60 Fed. 637;

*Wilhelmson v. Ludlow*, 79 Fed. 979, 981.

In the recent case of *The Albatross*, 184 Fed. 363 (decided August 3rd, 1910), in asserting the rule of sole responsibility against a steamer, the court said:

“Even though the steam tug was not navigated to the eastward as much as was possible to do, her failure did not contribute to the collision, as the Franklin was neither prejudiced nor embarrassed in her movements by any such omission.”

*The Ludvig Holberg*, 157 U. S. 60 (39 L. Ed. 620). Decided March 4, 1895. This was a collision between a steamship and the tow of a tug occurring in the lower bay of New York. The steamer was charged with excessive speed as well as with a failure to stop and reverse on hearing the first fog signal of the tug. On the first point, as to the speed of the Holberg, the court said:

“She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow (which was  $3\frac{1}{2}$  knots as shown by the Circuit Court’s findings) for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been.”

On the next fault charged against the Holberg it was said:

“No case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger.”

(This statement of the court should be compared with the statement made in *The Umbria* case two years later:

“We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead.”)

In *The Holberg* case the tug was held solely at fault for non-compliance with the rule which required her to



show that she had a vessel in tow, and in this connection it is said:

“This is one of those cases where a clear fault has been found on the part of one of the vessels both by the district and circuit courts, and the findings of fact are such as to render it incumbent upon us to affirm their decree. As we said in *Alexandre v. Machan*, 147 U. S. 72, 85 (37: 83, 90): ‘Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor’.”

*Baltimore Steam Packet Co. v. Coastwise Transportation Co.*, 139 Fed. 777 (1905), affirmed 148 Fed. 837.

This case shows an excused violation of the provision that a steamer's speed must be moderate in a fog (Inland Rules).

The schooner *Cramp* was at anchor in a fog in Hampton Roads and was run into by the steamer *Georgia*. The schooner admittedly gave no fog signals, as required of an anchored vessel, while on the other hand, the steamer was charged with going at a high rate of speed. The court said:

“The schooner *Cramp* insists that the collision did not come about because of her failure to give proper fog signals, but because the *Georgia* was proceeding at too high a rate of speed in the fog, in violation of the statutory provisions of the act of June 9, 1897, art. 15, 30 Stat. p. 99, c. 4 (U. S. Comp.

St. 1901, p. 2880). *This defense will not avail to relieve the Cramp, unless the same is clearly and conclusively established, since the Cramp has been found guilty of a palpable violation of the statutory requirement relative to navigation, sufficient within itself to account for the disaster, and which, in the judgment of the court, caused the same; and it will not do, therefore, for her merely to throw doubt upon the conduct of the Georgia in order to escape liability herself.* The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148; The Martello, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; the Georgetown (D. C.) 135 Fed. 854, 857.

Neither do the facts in this case support the Cramp's contention that the speed of the Georgia entered into the cause of the disaster. While it is quite clear from the evidence that the Georgia *had been* violating the rules of navigation in respect to her speed, still *this condition did not prevail at the time of the collision.* It may be said to be providentially so, as far as the Georgia is concerned, but nevertheless it serves to relieve her from fault. The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620. It appears that shortly preceding the collision the navigators of the Georgia observed the lights of the schooner Elwell on her port bow, just in time, by stopping and reversing and swinging to starboard, to avoid a collision with her; and it was after this occurrence, and as the Georgia was swinging back to port to regain her course, and before any headway of consequence had been gained, that she collided with the Cramp on her starboard side, then lying immediately across her course. Had the Cramp given the proper fog signal, the collision with her would easily have been avoided after the Georgia had passed the Elwell and practically come to a standstill.

It follows from what has been said that this collision was caused solely by the fault of the schooner Henry W. Cramp, and a decree may be entered so determining."

In *The Ashbourne*, 181 Fed. 815 (C. C. A. 6th Circuit, 1910), the head note reads:

“In a libel for collision the vessel guilty of primary fault is liable for the damages sustained, and clear proof of contributory fault by the other vessel must be presented before the latter can be held to bear equal share of the damages.”

(This case sustains a decision of Adams, J.)

See also

*The C. E. Paul*, 175 Fed. 246, 250;

*The Westhall*, 153 Fed. 1010, 1016;

*The William Chisholm*, 153 Fed. 704, 713.

In *The Livingstone*, 113 Fed. 879, four distinct faults were charged against the *Travers*, namely: She displayed no red light; she displayed no range lights; she had no lookout; she did not stop and reverse. The Circuit Court of Appeals for the 2nd Circuit held that none of these facts contributed to the collision, and held to the rule that where the fault of one vessel is clearly established, and such fault in itself will account for the collision, it is not enough to raise a doubt as to the management of the other vessel. In this case the vessels were approaching each other at night, and the gross fault of the *Livingstone* was in putting her wheel hard-a-starboard without necessity therefor, which brought the vessels into collision.

*The St. Louis*, 98 Fed. 750 (C. C. A. 2nd Circuit) 1899. (Decided December 7, 1890.)

The decision of the lower court in this case does not seem to be reported. The suit was brought by the

Delaware against the St. Louis. The Delaware *admittedly disobeyed* the second part of Article 16; in other words, *the rule was applicable*, but the point before the Circuit Court of Appeals was whether the Delaware had met the burden of showing that her failure to stop her engines *was not a contributing cause to the collision*.

The District Court gave judgment against the St. Louis on the ground that she was at fault in violating the *first* part of the rule as to speed, and held that the Delaware *had* met the burden of showing that her failure to observe the *second* part of the rule did not contribute to the collision. The conclusions of the lower court as to the speed of the St. Louis, and the non-contributory character of the Delaware's fault, rested upon the testimony of one witness.

The Circuit Court of Appeals reversed this judgment, and ordered the libel dismissed on the ground that the libellant *had not* met the burden of showing that her violation of the latter part of Article 16 was not a contributing cause to the collision.

The witness relied on by the District Court testified as follows:

“She (the Delaware) must have lost her headway and gone the other way, because I could feel the jar of the backward motion” (p. 751).

The Circuit Court of Appeals, in refusing to credit the evidence of this witness as to the speed of the St. Louis or the backward movement of the Delaware, said:

“He (the witness) assumed that the vibratory motion of the Delaware, incidental to the reversal of her engine, was caused by the backward motion



of the vessel; and, assuming this, no doubt believed that the St. Louis was coming ahead sufficiently fast to run down the Delaware when she was retreating.

\* \* \* \* \*

*Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware (in violating the rule as to stopping) was contributory to the collision. The Umbria, 166 U. S. 404-425, 17 Sup. Ct. 404, 41 L. Ed. 1053."*

See also

*The Saratoga*, 180 Fed. 620, 623, 624;

*The North Star*, 108 Fed. 436, 445.

*The Umbria*, 166 U. S. 404 (41 L. Ed. 1053).

(Decided April 5th, 1897.)

In considering this, the leading collision case on the question of contributory negligence, it is interesting to know that, although the regulation was not *legislatively* effective at the time, *the Circuit Court of Appeals based its decision on Article 16*, as it was *subsequently adopted, as a rule which but formulated a duty that the courts had often declared obligatory on the ground of prudent seamanship*. The Circuit Court of Appeals for the Second Circuit said:

"Prudent seamanship requires a steam vessel navigating in a fog, hearing apparently forward of her beam the fog signal of another vessel, the position of which is not ascertained, if the circumstances of the case admit, to stop her engines, and then navigate with caution, until danger of collision is over. This rule of conduct was approved by the international marine conference of 1888, as appears by ar-

title 18 of the proposed regulations. *That article merely formulates the duty which nautical experience had found it necessary to observe, and which the courts had often declared obligatory.*”

(53 Fed. 291.)

Throughout counsel’s argument in the lower court it was insisted that, at the time of the decision in *The Umbria* case, there existed no fog rule directing the action of vessels after hearing a fog signal ahead, and that Rule 18 merely dictated the duty of a master to do certain things, if necessary, in all cases involving risk of collision.

In this counsel would seem to be in error, for Article 18 of the Rules of 1885 had been construed time and again as applying to conditions of fog. It was so construed in *The Umbria*, and in *The Grenadier*, 74 Fed. 974, 975, it is said:

“The Eighteenth (Rule) also in terms contemplates that the vessels shall know their respective courses, and then be able to see the threatened danger. *In spirit, however, it is applicable to a case where the vessels are hidden from each other by fog, and the signals heard indicate possible danger.*”

Again, in the lower court counsel contended that a statutory rule had taken the place of the law of *The Umbria* which, before the rule was enacted, had declared the judicial idea of good navigation in a fog. This proposition we cannot accede to. The law of *The Umbria* case is based on a statutory rule, and both that rule and the one which has succeeded it enunciate, on the whole, nothing more than that which long experience had taught to be good seamanship.

At the International Marine Conference, Mr. Hall, delegate from Great Britain, in speaking of the proposed rule, said:

*"This is only making the law, that which practical seamen have believed and acted upon as the most prudent course under the circumstances."*

*Protocol of Proceedings, Vol. I, pp. 454, 455.*

To relieve the "Beaver" from the applicability of *The Umbria* decision, counsel below made an ingenious argument in an attempt to distinguish between the old Rule 18 and the new Rule 16. No such distinction, however, can properly be made, nor did the Supreme Court make any such. As we have pointed out, the Circuit Court of Appeals *expressly based its decision on the then unadopted rule* (Article 16), but, in the statement made by Justice Brown, it will be seen that the Supreme Court considered the position taken by the lower court to be in consonance with the *existing rule* (Article 18), for he states as one of the grounds on which the *Iberia* had been held at fault by the Circuit Court of Appeals: "*because she violated Article 18 of the International Regulations \* \* \**" (L. Ed. p. 1056). The circumstances were such that, had there been any reason for distinguishing the then existing from the proposed rule, it certainly would have been commented on. Neither the Circuit Court of Appeals nor the Supreme Court saw fit to remark any practical difference between the two on the general question of the duty to stop.

It was charged that the *Iberia* had changed her helm in ignorance of the exact position and course of the approaching *Umbria*. Of this she was acquitted by the

Supreme Court. She was also charged with fault for having failed to stop her engines when she first heard the fog whistle of the Umbria. On this last point the court said that the authorities generally hold that, if the fog be dense, *prudent navigation requires that she shall stop her engines* and drift ahead until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other. The court then said that the fog in this case was sometimes "so dense that vessels could not see each other more than one or two lengths off". We beg to cite at length from the decision which, up to the present time, has been followed by the courts as laying down the rule of contributory negligence in fog collision cases:

"We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead. Under such circumstances she may proceed at a reduced rate of speed; but if the whistle be repeated two or three times, and appear to be drawing near, the authorities generally hold that, if the fog be dense, prudent navigation requires that she shall stop her engines and drift ahead, until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other.

\* \* \* \* \*

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until *the course* of each was definitely ascertained. In a lighter fog



it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

\* \* \* \* \*

“\* \* \* the whole theory of the cases which hold it to be the duty of a steamer meeting another steamer in a fog, to stop or reverse, *is based upon the hypothesis that a collision may thereby be avoided*; and if the facts afterwards ascertained indicate that such maneuver, under the circumstances of a particular case, could not have subserved any useful purpose, the steamer ought not to be held in fault *for the nonobservance of the rule*. *These rules are intended solely for the prevention of collisions*, and if it be clearly apparent that the observance of a certain *rule* would not have prevented a collision in the particular case, *the nonobservance of such rule becomes immaterial*.”

After reviewing a number of American and English cases on the subject of the duty of vessels to stop in a fog on hearing the fog signal of an approaching vessel, attention is called to several distinguishing features in the English cases from the case at bar, and the court then said:

“In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the *Iberia*, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been a fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the *Iberia* would have been of the slightest avail, in view of the extraordinary speed

of the *Umbria*. It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the *Umbria* reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.”

Any attempt in the case at bar to avoid the application of this rule of *The Umbria* case must be futile, for it has been adopted by our courts from the time of its promulgation down to the present and its adoption here makes hopeless the appellee’s case. It will doubtless be claimed that the Circuit Court of Appeals for the First Circuit failed to follow it in the case of *The Admiral Schley*, 131 Fed. 437; 142 Fed. 64. In that case the tug Mayer had a tow over 2,000 feet long and was “loitering” in the path of navigation. The whistle of the *Admiral Schley* was first heard, apparently, less than a mile away, and the collision took place less than a minute thereafter, while the Mayer and her tow were

*proceeding ahead.* We wish to call the court's attention to the following language in the opinion:

“\* \* \* inasmuch as the Mayer *ran her bow into the Schley* under such circumstances that it is clear that, if she had run a few feet less there would have been no collision, it is equally clear that if either vessel had obeyed the International Rules no injury would have resulted. It is true that it is sometimes difficult for a tug having a long tow to stop, but in this case the difficulty was of the Mayer's own making” (142 Fed. p. 67).

Note also what is said in the main decision as to *The Umbria* case:

“However, it is impossible to concede that there is any analogy between a tug like the Charles F. Mayer, ‘loitering’ with her tow, and a steamer like the *Iberia*, which, at least, *was endeavoring to escape by some action on her part*” (131 Fed. p. 437).

Is it not clear that under the very reasoning of this case the “*Selja*” would have been absolved in the case at bar, when she had stopped her engines six minutes before the collision and was *moving astern* at the time of the collision?

*The Schley* case does, as counsel will doubtless contend, recognize the “but for” rule as laid down in *The Pennsylvania*, but it recognizes it as it was meant to be recognized, as applying to a vessel in fault “*at the time of the collision*”. And the Mayer was in fault at that time because she had not checked her headway at that time.

It will be observed that in *The Georgic* case (*supra*) the court refers to the case of *The St. Louis* as a decision

binding upon it. Reference to *The St. Louis* case would show that the Circuit Court of Appeals clearly recognizes the rule as to contributory negligence laid down in *The Umbria* case, for it says:

“Of course, if the *Delaware* was reversed so that she was going backward in the water when the collision took place, and the *St. Louis* was not going at a moderate rate of speed, it cannot be held that the fault of the *Delaware* was contributory to the collision. *The Umbria*, 166 U. S. 404-421; 17 Sup. Ct. 404; 41 L. Ed. 1053.”

In connection with the rule of contributory negligence laid down in *The Umbria* case, the following statement of the Circuit Court of Appeals for the Second Circuit in *The Portia*, 64 Fed. 811, at p. 814, is significant:

“An antecedent act of negligence is remote when, notwithstanding the other vessel, by the exercise of ordinary care, can avoid a collision; and if, notwithstanding the fault of the tugs, the *Portia* could have avoided the collision by obeying the rule which, under the circumstances was imperative, she alone must be condemned.”

*The Columbian*, 100 Fed. 991 (C. C. A., 1st Circuit), decided April 12, 1900.

This was a collision between a steamer and a schooner occurring in a fog shortly before midnight on August 30, 1898.

After discussing the evidence in the case, the court concludes its decision as follows:

“As we have already said, the fault of the *Columbian* was not only flagrant, but, on this appeal, confessedly so. (Speed of 9 or 10 knots.) While we have no occasion to state the presumption as to the whole case against a vessel confessedly in fault, or



shown to be by uncontradicted evidence, so extremely as it is stated in *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84, 85, yet we have no hesitation in adopting the modified form found in the *Umbria*, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053, as a practical rule which cannot be disregarded, and which may be justly applied in weighing proofs under the circumstances of the case at bar. There it was said that, ‘so gross was the fault of the *Umbria*, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor’. Any theory brought forward by the *Columbian*, guilty as she was, of a flagrant error, with a view of excusing herself in any part, is subject to suspicion to such an extent that it cannot prevail to hold the schooner, so long as the other probabilities, in connection with the direct proofs, do not so preponderate as to satisfy the mind in her behalf. Since, for the reasons we have stated, we cannot satisfy ourselves that the propositions of the *Columbian* with reference to the alleged faults of the *Doughty* are correct, we must necessarily hold that they are not sustained.”

*The Commonwealth*, 174 Fed. 694, Adams, J.  
(Decided January 15, 1910.)

The *Commonwealth* was held at fault for excessive speed in a fog. The *Volund* was charged *inter alia*:

*With not stopping as required by Article 16.*

In discussing the evidence as to the violation of this rule, and coming to no conclusion on it, the court then proceeds:

“Nevertheless, even if the *Volund* was not following strictly the provisions of Article 16, I do not think that her remissness was such as to condemn her under the circumstances.

\* \* \* \* \*

“Even, however, if her navigation was faulty, she should be exonerated under the authority of the *Umbria*, supra, in view of the gross fault of the Commonwealth.

\* \* \* \* \*

“There is considerable legitimate criticism of the Volund’s navigation, but in view of the gross fault of the Commonwealth in proceeding at such a rate of speed, I do not think, under the authorities, that the Volund’s minor faults are clearly enough established to entitle the Commonwealth to an apportionment of the damages. *The Victory*, 168 U. S. 410; *the Transfer* No. 14, 127 Fed. 305, 306.”

*The Cascades*, 178 Fed. 726, Wolverton, J. (Decided April 18, 1910. Affirmed by this court Oct. 2, 1911; 190 Fed. 729.)

This was a collision between meeting vessels, and both were held in fault for remaining at full speed until nearly the time of the collision, although each had heard the fog signals of the other. The concluding paragraph of Article 16, however, was not applied and it was expressly held that the duty of each vessel was to so navigate as to enable them to stop before coming into collision with another vessel after the latter could be seen, assuming that such other vessel observed the rule. This rule is explicitly stated twice,—on pages 731 and 732. The case of *The Umbria* is cited with approval and the following passages are quoted:

“The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels

to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

\* \* \* \* \*

“The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.”

*The John A. Hughes*, 184 Fed. 308 (1911). Circuit Court of Appeals, Second Circuit, reversing Adams, J.

Tugs with tows were approaching each other in a dense fog at the eastern end of Long Island Sound on almost opposite courses going at a moderate rate of speed. Each was blowing appropriate fog signals. When at some distance apart, and neither seeing each other, one gave a helm signal which was answered by the other. Each acted on the signal, as did all the tows but one, and this latter, throwing her helm the opposite way from that called for by the signal, collided with one of the approaching tows, and brought suit against each of the tugs. The District Court held both tugs in fault for not stopping when whistles were heard ahead. The

Circuit Court of Appeals held that *if not stopping had contributed to the collision*, then, the decree of the District Court was right. After quoting Article 16 of the Inland Regulations, the court said:

“By good luck or by good management, the tugs did ascertain their relative positions correctly, and agreed upon a course of navigation which would have carried them and their tows clear of each other but for the Powell’s shear. If their tows had come into collision without the intervention of this independent cause, their failure to stop would have put them at fault. On the facts of the case we cannot agree that it contributed to the collision at all.”

*The Minnesota*, 189 Fed. 706. Holt, J. (Decided February 28, 1911.)

This is the last reported case on the latter part of Article 16. The steamer *Minnesota* was held to have been unseaworthy at the commencement of her voyage for want of an efficient whistle, which fault, together with her failure to reverse at once when going at seven knots per hour on hearing the *Sidra*’s signal ahead, rendered her solely liable for the collision. On the charge of contributory negligence the court said:

“I can see no ground for criticising the navigation of the *Sidra* except upon the single point that after she had once stopped her engines on hearing the fog horn ahead, and they had remained stopped for a minute, she started ahead again.”

After then citing the latter paragraph of Article 16, the court quotes from *The Umbria* case as follows:

“The general consensus of opinion in this country is to the effect that a steamer is bound to use only



such precautions as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerage way."

This application of *The Umbria* case, in direct connection with the latter part of Article 16, is significant of the fact that the courts of today are still following that case on the question of contributory negligence. The court, after commenting briefly on the facts, closes its opinion with this judgment:

"At all events, the fundamental faults of the Minnesota are so marked, and the question whether the Sidra was in fault in starting ahead after stopping for a minute is so doubtful, that the entire blame for the collision should be placed upon the Minnesota."

In the case of *The Ashbourne*, Judge Adams, whose opinion is found in the reported decision of the case in the Circuit Court of Appeals (181 Fed. 815, 818), said:

"There has been a strong disposition manifested on the part of the courts recently to let the blame rest where it principally belongs."

At the most, the "Selja" was guilty of a technical violation of the rule at a period long anterior to the collision and at the moment of collision was actually retreating from the point where the course of the two vessels intersected. In fact, if the "Beaver" was swinging rapidly to starboard from her original course, with

the "Selja" retreating from the point of intersection of the courses, then the collision occurred in spite of the fact that the "Selja" was moving away from the place where, in the natural order of things, it would have occurred and the "Beaver" actually pursued her in her backward movement and ran her down. Under such circumstances, unless the appellee can show that the "Selja's" failure to stop her engine, on hearing the first and succeeding whistles, embarrassed the "Beaver" in her movements, it seems perfectly clear that under the authorities it cannot be said that the "Selja's" fault was a contributing cause to the collision.

We might also add that, after going over all the cases under Article XVI, *we have not found a single one in which a vessel, which was actually retreating at the time of the collision, has been held in fault.* Such a vessel, so retreating, while she may perhaps have been blameworthy in her previous movements, cannot be held, under any proper definitions of legal cause, to have contributed to the collision.

We respectfully submit that to sustain the decision of the lower court on the question of the contributing character of the "Selja's" fault would be to ignore principles governing collision cases of such well known character that they need no special references to substantiate them, as for instance, what becomes of this principle?

Where gross fault is admitted and other gross faults are established by uncontradicted evidence, and both the admitted and proven faults are the proximate cause and sufficient in themselves to account for the collision,

proof of a contributing fault on the part of another vessel must be clear and convincing, and is not sustained when it raises a doubt as to the fault of such other.

Or this:

Under the facts above stated as to the gross fault of one vessel, proof of a contributing fault on the part of the other cannot be established if such other vessel so maneuvers that she has come to a stop after sighting the former vessel, and *a fortiori*, if before the collision she is actually retreating from the point of intersection of the two courses.

### *Major and Minor Fault Doctrine.*

We have already called attention to some of the cases recognizing this well known principle, and there remains but a word to say as to its appropriate application to the facts of this case. It is immaterial in what order these facts are reviewed in reaching a conclusion as to the comparative gravity of faults. Let us, therefore, take up those applicable to the case of the "Selja".

Although she is charged with a violation of the stopping requirement of Article 16, the record shows affirmatively that, at the time of the alleged violation, it was her master's judgment that the rule was not applicable because of the distance separating the two vessels. In addition there are found in the record circumstances and conditions tending to support Captain Lie's judgment on this point. Furthermore, his judgment finds further support in the subsequent whistles of the "Beaver", as well as in the actual

distance separating the two boats as finally ascertained. And lastly, it finds vindication in the fact that he had practically brought the "Selja" to a point where she was dead in the water at the time the "Beaver" came in sight, and at the time of the actual impact *had started her on a retreating movement*. Let us again re-state the maneuvers on the part of the "Selja" accomplishing the result last stated:

Some two or three minutes after the first whistle was heard, the "Selja's" engine was put at slow speed. Five minutes afterwards it was stopped and she drifted ahead under the momentum of her former slow speed for five minutes longer and until she had almost become dead in the water, when the "Beaver" loomed in sight and then she reversed her engine and commenced to move backward. Surely, under these circumstances, it is at least a doubtful question whether the master's affirmative evidence of the inapplicability of the rule's requirement should not be upheld, and this doubt increases in favor of upholding said judgment as we consider the conduct of the other ship. She proceeded at her full speed, in absolute indifference to the fog, up to the very "jaws of the collision". Her speed was such that it must have had some effect on the ability to hear other whistles, for of the "Selja's" she heard but the two given next prior to the collision, and the "Selja" had a good strong whistle. The warning given by the first of these whistles was completely ignored, except as it prompted the vessel's master to blindly *change the course of the vessel's speed*; the warning given by the second whistle was so alarming in



its proximity as to move the "Beaver's" master to change the vessel's course again and in the opposite direction from the last change, and to stop and reverse her engines at full speed almost instantly when the "Selja" loomed in sight, lying directly in the path of the last change, and on this course the "Beaver" followed up the retreating vessel and sank her.

The "Beaver's" violation of the moderate speed rule was admitted at the end of a long trial, her violation of the stopping requirement of Article 16 and the general prudential requirements of Article 29 were so clearly proven by her own uncontradicted evidence that they stand on the same footing with her admission. The situation then is that, as to the "Selja", the applicability of the stopping requirement of Article 16 is strongly contested; as to the "Beaver", she stands convicted of the violation of three of the rules, one by admission and two by uncontradicted testimony, all violations existing at the time of the collision and each in itself sufficient to account therefor.

We submit that under these facts it is useless to deny the applicability of the major and minor fault doctrine to this case.

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## VI.

### **The Case of the "Belgian King", 125 Fed. 869.**

We have reserved our discussion of this case until this time because it is squarely in point as embodying the decision of this court on the non-applicability of

the stopping requirement of Article 16 to a vessel less favorably situated than was the "Selja".

The facts, as found by the court, in so far as they bear on Article 16, and the conclusions drawn therefrom, are sufficiently established by the following quotation from Judge Morrow's opinion:—

"Article 16 of the act of August 19, 1890, as amended May 28, 1894 (U. S. Comp. St. 1901, p. 2868, see 28 Stat. 1250), prescribing regulations for preventing collisions at sea, provides as follows:

" 'Every vessel shall, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions.

" 'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

"Did the vessels act in accordance with these regulations? There is evidence tending to show that the Belgian King had been going at a greater rate of speed than 'half speed' prior to the hearing of the fog whistle of the Tellus at 10:45 p. m. But accepting the testimony of the captain of the Belgian King that his vessel was proceeding on her course at half speed, or at the rate of  $8\frac{1}{2}$  knots per hour; that between 10:25 and 10:30 p. m. the fog had become dense and had 'shut in thick'; and accepting the testimony of the captain of the Tellus that at half past 10 o'clock his vessel also encountered the fog, and that the engines of his vessel were brought down to 'slow speed', or three knots per hour, which speed, the captain testified, was the lowest at which steerageway of the ship could be maintained; and that seven or eight minutes later, according to the engineer of the Tellus, the engine

was brought to a stop—we have this situation: From the time the dense fog set in at 10:30 p. m. until the Belgian King was made aware of the approach of the Tellus, at about 10:45 p. m., the Belgian King was going at  $8\frac{1}{2}$  knots per hour, and the Tellus at 3 knots per hour, the slowest rate consistent with the maintenance of steerageway; that this speed was maintained for 7 or 8 minutes, when the engine was stopped. It is evident from this statement of the testimony that the Belgian King was not during this time going at a moderate rate of speed, having careful regard for the existing circumstances and conditions. This is determined partly by the inference to be drawn from the fact that the Tellus, under the same conditions, reduced her speed to 3 knots per hour, and after 7 or 8 minutes stopped her engine, while the Belgian King maintained a speed of  $8\frac{1}{2}$  knots per hour; but it is also determined by the fact that, while the Tellus was being navigated at the moderate rate of speed required by law, the speed of the Belgian King was maintained at such a rate that she could not and did not stop in time to avoid a collision after the Tellus came in sight. *The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a stand-still by reversing her engines at full speed before she could collide with a vessel which she could see through the fog.* The Colorado v. The H. P. Bridge. 91 U. S. 692, 702; 23 L. Ed. 379; The Nacoochee v. Moseley, 137 U. S. 330, 339; 11 Sup. Ct. 122; 34 L. Ed. 687. That the Tellus observed this rule, and that the Belgian King did not, is established by the testimony as to the rate of speed each vessel maintained prior to the collision, and the fact that, at the time of the collision, the Tellus had stopped, and the Belgian King had not; also, by the character of the wound inflicted upon the Tellus.”

We would also point out that the Tellus heard the Belgian King's whistle at 10:32, whereas the Belgian

King did not hear the whistle of the Tellus until 10:45, or just before the collision. We would further point to the claim made by the Belgian King that she had "about come to a standstill" at the time of the collision, a claim also made by the "Beaver" in this case.

It will thus be seen that the cases are as nearly identical as it is possible for two cases to be. The position of the Belgian King was certainly no more "ascertained" than was the position of the "Beaver" in the case at bar. Yet it was held there that the Tellus was not at fault, because she was maintaining before the collision

*"such rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog".*

For the same reason the "Selja" should be exonerated in the case at bar.

But it was contended in the lower court that it was held that the Tellus "*had actually ascertained*" the position of the Belgian King and that, *therefore*, Rule 16 did not apply. If this be true, the same finding should be applied to the case at bar. But we submit the court *did not* so hold. What it did hold was that the position of the Belgian King was "*sufficiently ascertainable* by the Tellus to permit her to continue her course at slow speed" after hearing the first whistle, and we take this as meaning that the Belgian King was then so far away as to involve no danger of collision. But, whatever the court meant, it is clear that the *controlling reason* for exonerating the Tellus was that already re-



ferred to, and that controlling reason exactly coincides with the rule laid down in *The Umbria*, which is the law today as well as in the past on the rule of proximate cause. The fault of the *Tellus*, if fault there was, in not stopping her engines on hearing the Belgian King's first whistle, did not contribute to the collision and the court clearly so holds.

Counsel in the lower court further contended that the case in question was one of novel impression. It is perfectly clear, however, that at the time of the decision (October 19, 1903) the following cases, among others, had already been passed on: *The St. Louis*; *The El Monte*; *The Cathay*; *The Rondane*; *The Bernhard Hall* and *The Koning Willem*. We do not believe that the court overlooked these cases.

Furthermore, counsel then contended that the briefs on file in *The Belgian King* case did not refer to the cases above cited. This we admit, but the arguments found in those cases were placed strongly before the court. Mr. Andros for *The Belgian King* laid repeated emphasis on Article 16, insisting that it had changed the rule of *The Umbria* case; while Mr. Page, counsel for the *Tellus*, as strongly urged that the rule of *The Umbria* was still applicable despite Article 16. These contentions were the ones most vehemently pressed and the latter contention undoubtedly prevailed.

The brief of *The Belgian King* says in part:

“What, under such circumstances, was the duty of the *Tellus*? This question is answered by Art. 16 of the Act of 1890. \* \* \* From the sound of the fog whistles, the officers of the *Tellus* could not

possibly have ‘*ascertained* the position of the Belgian King’, could not possibly *know* whether the latter steamship was exactly straight ahead or a little on the port or starboard bow; nor, in the pleadings, is such knowledge claimed; all that is claimed is that, judging by the sound, the ship was *nearly* straight ahead. Indeed, had such knowledge been claimed, it would have been opposed not only by the decisions of the courts of admiralty of the United States and of England, but to the universal experience of seamen \* \* \*” (p. 25).

Mr. Andros then goes on to show the uncertainty of the direction of sound in a fog, citing among others the statement of Mr. Flood of Norway, also relied on by counsel below in this case. Referring, later on, to *The Umbria* case, Mr. Andros says:

“The *Umbria*, 166 U. S. 404, was largely relied upon in the District Court by counsel for the *Tellus* in defense of the maneuvers of that vessel” (p. 33).

He proceeded to discuss the case’s applicability and then used the identical argument presented by counsel in the lower court in the case at bar:

“But, in addition to these points, a conclusive reason why the failure of the *Tellus* to stop, and her change of course was a fault under the circumstances of this case, is this: That, when the *Umbria* collision happened, there was no regulation in force to the effect that a vessel, hearing a fog whistle ahead, should stop; whereas, since that decision, and before the collision of the case at bar, a regulation has become law which leaves a vessel no option under the circumstances, and which now leaves no room whatever for the discussion which occupied the Supreme Court in the *Umbria* case, namely, the regulation in Art. 16, Par. 2, that a steam vessel

finding herself under the circumstances of the *Tellus*, 'shall \* \* \* *stop her engines*, and then navigate with caution until danger of collision is over.' In the case of the *Umbria* the question before the court was: What does *prudent seamanship* require of a steam vessel navigating in a fog, in the absence of legislative enactment? Since that case was decided, Congress has settled that question by positive enactment, and the only question in the case at bar is: *Did the Tellus 'stop her engines and then navigate with caution'?*" (p. 38).

Further quotations might be made but the foregoing clearly show that the applicability of Article 16, and of *The Umbria* case, under that rule, were fully before the court, and that the decision was rendered with both in mind.

Let us now turn to the brief of the *Tellus*, the views of the learned author of which we here adopt as our own. In the summary of his contentions at the opening of the brief he lays repeated and deserved emphasis on the fact that, as the *Tellus* was at a standstill when struck, it was impossible to say that she contributed to the collision. The following argument, in exact line with our contentions here, is also significant:

"1. The *Tellus* at the time the two vessels began to approach each other *so as to involve risk of collision* (italics ours), and from that time up to the occurrence of the collision, used due caution and observed the statutory regulations."

(Brief of *The Tellus*, p. 4.)

Under this heading the brief later says:

"*The Tellus was stopped and at a standstill when the collision occurred.* This fact was distinctly found by the learned District Judge.

"*It is the controlling fact in the case*" (p. 8).

Again the brief says under the same heading:

“The one object of the law is to insure the ability of the two vessels to come to a standstill before collision. This the *Tellus* did. *The Belgian King did not do it*” (p. 13).

Later on it is said:

“It is enough to say that the Belgian King was not being navigated in such a way as to enable her to stop in time to avoid collision after the approaching vessel came in sight, providing the latter was going at the moderate rate of speed required by law (citing the *Umbria*).

“If the Belgian King had stopped as the *Tellus* did, there could have been no collision. If she had slowed twenty minutes before the collision, when the *Tellus* slowed, there could have been no collision.

“The primary fault, that without which there could have been no collision, is thus found to be wholly on the part of the Belgian King” (pp. 20 and 21).

And, finally, counsel for *The Tellus* says:

“The burthen of avoiding a collision is not cast upon one ship alone. That ship is relieved from censure and fault which so navigates that a collision will be avoided, provided the other ship is equally careful in her movements (*The Umbria*, *ubi sup.*)” (p. 32).

How can it be said, in view of these arguments, that all points now before the court under Article 16 were not before the court in *The Belgian King* case? It cannot be said it was a case of “novel impression”. Article 16 was fully discussed and analyzed in both briefs and *The Tellus* sought and found an escape from it under *The Umbria* decision. We submit that the case is a con-



trolling one, that it is on all fours with the case at bar, and that it is decisive as against any contention of fault on the part of the "Selja".

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## VII.

### The Decision of the District Court.

We cannot believe that this court will accord to the stopping requirement of Article 16 the harsh construction given it in this case by the lower court, nor do we believe that this court, in order to give effect to the rule and place the "Selja" on a plane of equality of faults with the "Beaver", will shut its eyes to long established principles which have governed in collision cases for more than half a century. The construction of the latter part of Article 16 given by the lower court ignores the principle of proximate cause and fails to recognize the principle that a vessel is not to be held as contributing to a collision, which so maneuvers that she is able to come to a dead stop in the water after sighting another vessel and before colliding with her. As was said by the Supreme Court:

"We are not to shut our eyes and to accept blindly an artificial rule which is to determine in all cases whether the master is liable to the charge of negligence in causing any loss or damage which may happen."

*The Farragut*, 10 Wall. 334 (19 L. Ed. 946).

And yet it would seem that this is precisely what was done by the trial court. It not only declared for a nullification of the express limitation found in the rule

itself [It said: "*It (the rule) was designed to take away from a vessel the right to proceed at all after hearing the first signal, without first stopping the engines*" etc. That the rule assumes, "*that the zone of danger of collision is reached when the whistle is heard and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the on-coming ship*"], but to this hard, unnatural construction it refused to apply any of the recognized principles which should have been applied to a vessel maneuvered as was the "*Selja*". Instead, it improperly applied the "but for" rule of the case of *The Pennsylvania*, linking with it the test of proximate cause laid down by an English court, in direct conflict with the test laid down by our Supreme Court. In applying the rule of proximate cause under Article 16, Barnes, J., in the case of *The Britannia* (X Asp. 65), said:

"If the *Britannia* had stopped her engines in the first instance, her progress would have been stopped and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."

In applying the same test in the case at bar the lower court said:

"Indeed it is quite apparent that if she had observed the rule she would not have reached the point of collision at the time she did and the "*Beaver*" would have passed her."

As opposed to this test of the lower court on the subject, the Supreme Court in the case of *The Umbria* said:

"Manifestly this is *not* the proper test. The propriety of certain maneuvers cannot be deter-

mined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.”

It is quite true that if the “Selja” had stopped on hearing the “Beaver’s” first whistle, the collision would not have happened. It is also equally true, however, that if the “Selja” had gone ahead at either full or half speed the collision would not have happened. This demonstrates the weakness of the test applied by the lower court and this demonstration is exactly what caused the United States Supreme Court to disregard such test in *The Umbria* case:

“It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the *Umbria* reached it. Manifestly this is not the proper test.”

We have already dealt fully enough with the cases cited by the court as upholding its construction of Article 16. It is worthy of comment, however, that, while the court relies on the case of *The St. Louis*, as

showing a violation of the rule, it fails to notice the limitation expressly placed on it by that decision:

“Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware was contributory to the collision.”

In other words:

“Of course the fault of the ‘Selja’ did not contribute to the collision in the case at bar.”

As to the cases cited by the court to sustain its view that the “Selja” contributed to the collision, they are based upon the well known rule of *The Pennsylvania*, which is expressly limited in its application to vessels violating the rules “*at the time of the collision*”.

The case of *The Ellis*, 152 Fed. 981, cited by the lower court, was a case of fault at the time of the collision, and the court in dealing with this fault expressly said:

“The actual violation *at the time of the collision* of a statutory rule intended to prevent collisions is presumably a fault, and if not the sole cause of the collision, at least a contributory cause.”

Almost identically the same words were used in the case of *Hawgood Tr. Co. v. Mesaba S. S. Co.*, 166 Fed. 697, and in the case of *The Dauntless*, 121 Fed. 420, Judge De Haven simply cites the exact language of *The Pennsylvania* case. Judge De Haven’s view of Rule 16, however, is shown by the case of *The Belgian King*, 113 Fed. 525, 526, where the vital fact that the Tellus



had been able to come to a stop before the collision took place completely exonerated her. And it is also worth noting that, in the Belgian King case, the vessels were not on parallel but on crossing courses, as counsel may contend the "Beaver" and the "Selja" were in the case at bar (see 125 Fed. at p. 877).

The case of *The Admiral Schley* has been already sufficiently distinguished, and as for the case of *Davidson v. Am. Steel Barge Co.*, 120 Fed. 250, we believe that it will, when examined, support our contentions rather than those of the appellee.

And let us here say that by "*at the time of the collision*", it is simply meant that the violation of the rule must bear some direct relation in point of time to the collision, since otherwise a violation *hours* before a collision would put a vessel in fault.

The real point is this: If a vessel violates a rule, and that violation can possibly be said to be not overcome at the time of the collision, then the rule of *The Pennsylvania* clearly applies. If, however, the violation *be overcome* before the collision, the rule does not apply. The underlying object of Article 16 was to bring vessels to a standstill before a collision could occur (see Protocol of Proceedings, pages 407-509). If that object is not attained, a vessel will be in fault at the time of the collision for her prior violation of the rule in question. If, however, the object *is* attained, that violation is not a fault existing at the time of the collision. In the case at bar the "Selja" had not only stopped,

but was moving backward at the time of the collision. Her alleged prior fault had, therefore, been overcome. There is no case holding the contrary, while the cases of *The Belgian King* and *The St. Louis* squarely sustain this contention.

We further submit that the lower court should have in some way distinguished the case of *The Belgian King*, a decision binding upon it. Yet the only reference to that case is in regard to an entirely different point, to wit: the possible excessive speed of the "Selja" up to 3:05 p. m., which fault, if there was any fault at all, is entirely excused under *all* the cases, where a vessel is so navigated as to be able to come to a stop after sighting an approaching vessel, which was done in this case (see *Balt. Steam Packet Co. v. Coastwise Tr. Co.*, 139 Fed. 77, and *The Ludvig Holberg*, 157 U. S. 60, heretofore cited). And this illustrates the very point we make, for, if a violation of the moderate speed rule can be overcome so as to excuse a vessel, why cannot also a violation of the latter part of the same rule be overcome? We know of no answer to this question. In neither case is the violation of the rule a violation "*at the time of the collision*".

We respectfully submit that the lower court erroneously held that Rule 16 was applicable at all, and we submit that it palpably erred in holding that the violation of said rule by the "Selja" contributed to the collision.

## VIII.

**Conclusion.****THE NAVIGATION AND DISCIPLINE ON THE TWO VESSELS.***The "Selja's" Navigation and Discipline.*

We have cited but little of the evidence in the case because the court will undoubtedly read it all and, when it is read, we venture to believe that one cannot help but be struck with the marked difference between the navigation of the two vessels and the discipline maintained on each. The master of the Norwegian ship was continuously at his post on the bridge, soundings were faithfully taken, bearings of the Point Reyes siren were taken, the vessel's position was plotted on the chart, her speed was regulated from time to time as the circumstances called for, so that, when the collision came, she was actually backing, the steam pressure on her boilers was regulated so that it would not blow off and thereby affect the hearing of fog whistles. The discipline on the ship was perfect up to the very last moment. When collision was inevitable the "Selja's" chief engineer and his first assistant rushed down to their posts in the engine room with no thought except that that was their place when danger threatened, and they remained there until the "Selja" began to sink and until summoned by Captain Lie to save themselves. Search as one may there is not to be found a word to substantiate a charge of lack of discipline or faulty navigation.

The Circuit Court of Appeals for the First Circuit has made this statement, and its pertinence here is apparent:

"In several cases we have also referred to the fact that the maintenance of good discipline aboard

a vessel, and evident care in proceeding in difficult situations nearly to the time of a collision, justify a strong presumption that she was vigilant with reference to the immediate circumstances which brought on the catastrophe."

*Ross v. Merchants & M. Transp. Co.*, 104 Fed. 302, 304.

See, also,

*The Genevieve*, 96 Fed. 859;

*The Columbian*, 100 Fed. 991, 997.

*The "Beaver's" Navigation and Discipline.*

Let us take a brief glance at the other vessel. Along a frequented path of commerce, at the very entrance to the largest port on the Pacific Coast, she was steaming in a dense fog at her *full speed*. Surely the situation could not have been more fraught with *continuous* peril, at any moment calling for the instant exercise of the coolest judgment, for, going at such speed, with "*the full power on the ship*", nothing but the sanest, most energetic maneuver would be of the slightest avail to avert an ever present disaster. The lives of the "Beaver's" passengers were absolutely dependent upon the constant vigilance, cool judgment and quick skill of Captain Kidston. Surely, under these extraordinary circumstances, *when a desperate chance was being taken*, the master's place was on the bridge of his ship. Yet, at the moments of greatest need, the evidence shows that he was not there: At 2:15 when his vessel passed her last point of departure; at 3 o'clock, the time, *he says*, the fog shut in thick; at the time the first whistle of another steamer was heard out of the fog on the port



bow and, finally, at the critical moment, a minute or so before the collision, when the "Selja's" first whistle was heard; at each and all of these times he was absent. More than this: Whistles were heard out of the fog, forward of the beam, not once or from a single steamer, but many times from several steamers, but these warnings of peril were passed unheeded. Captain Kidston heard these whistles *a mile off*, the lookout forward heard *them close by*; fishermen testify that they were almost run down by the "Beaver"; Duxbury whistle was heard by the master when off the bridge, but by no one else; the lookout heard no steamer whistle on the port side, the master did; the master was supposed to know that his ship's engine was working 77 revolutions, yet sent word to reduce to 76 (a farcical order, we submit, under the grim circumstances); the order was given to a quartermaster who did not deliver it for ten minutes; the quartermaster on the bridge, stationed there as a lookout during the fog, was withdrawn to be used as a messenger; the master, in disregard of the rule of law, changed his vessel's head before sighting the "Selja"; the officer in charge of the bridge, admittedly in ignorance of the position of the sound of the "Selja's" first whistle, failed to stop the ship's engine, or take any other precautionary step except to call the master to his place of duty on the bridge; the master understood the three whistle backing rule to apply to vessels that were not in sight of each other; the lookout forward (who should have heard the "Selja's" whistle long before he did hear it) had been drinking and fell into the water from one of the "Beaver's" boats (IV,

1218; II, 592); and lastly, with the frightful experience fresh in mind of having sent to the bottom of the sea a valuable ship and cargo, with the loss of two human lives, the master *took another chance* and returned in the fog to the port of San Francisco at *full speed* (Kidston, III, 921) and, on hearing the fog signal of the United States Revenue Cutter McCullough, forward his ship's beam, *failed again to stop his engine* (Id. 919). These are harsh arraignments, but are justified by the facts.

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We submit that the gross faults of the "Beaver", both admitted and proven, were the proximate and sole cause of the collision, and that the decree appealed from should be set aside and appellant should have a decree awarding the full damages suffered by himself and the owner of the "Selja" together with interest and costs in addition to the decree which he already has in favor of his officers and crew.

Dated San Francisco,

February 11, 1914.\*

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*

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**Note:**—Recognizing the importance of this case, we have had this brief printed long before the time required under the rules, so as to give our distinguished opponents ample time to file their brief within the time allowed **them** by the rules.

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,  
*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, claimant of the American steamship "Beaver",  
*Appellee.*

## BRIEF FOR APPELLEE, SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, CLAIMANT OF THE AMERICAN STEAMSHIP "BEAVER".

WILLIAM DENMAN,

IRA A. CAMPBELL,

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MCCUTCHEEN, OLNEY & WILLARD,

DENMAN AND ARNOLD,

*Of Counsel.*

*Filed this.....day of March, 1914.*

FRANK D. MONCKTON, Clerk.

By.....

FILED

Deputy Clerk.





No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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OLAF LIE, master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,  
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*Appellee.*

## BRIEF FOR APPELLEE, SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, CLAIMANT OF THE AMERICAN STEAMSHIP "BEAVER".

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In his opening brief, counsel has made an elaborate statement of facts, with which we take issue vigorously in practically every essential feature.

In a later portion of this brief, we clearly show, after a careful consideration of the voluminous evidence, several vital faults on the part of the "Selja", and that the facts which she claims as establishing her case

are not only not supported by the record but are contradicted by the overwhelming preponderance of the testimony. Not even the red ink foreword on the cover is a fair summary of the evidence as we understand it.

We show, from certain undisputed statements in the testimony of the "Selja", that the movements described in her elaborate diagrammatic explanation of the occurrences off Point Reyes could not have taken place in the manner indicated. With regard to the movements of the "Beaver", we show that her fault, while a violation of the rule, had a good reason behind it, i. e., the safety of her passengers, and that it cannot be described as recklessness or gross negligence, even though that question were pertinent, which it is not. Not only do we dispel all the alleged inconsistencies as to the testimony as to her speed, but we show that the different rates testified to by the different officers as existing at different times are controlled by different circumstances, making the whole testimony harmonious, and show it to be the only testimony that could be given for the varying circumstances. We show that the elaborate scientific calculations made by the "Selja's" experts in ship construction as to the speed of vessels in the smooth water of the launching pool are clearly contradicted by officers of United States ships and experts, both nautical and otherwise, on the effect of wave action on vessels. We show, by the undisputed official records, that the testimony of the Scandinavian fishermen procured as witnesses by Captain Lie, as to the conditions on the day of the col-

lision, is not only untrue but seems a continuation of the methods whereby Lie, out of whole cloth, constructs a theory that the collision occurred off Point Reyes when in fact it was several miles away.

The opinion of the lower court disposes of the question of the liability of the "Selja" on the statement of facts in the libel, and the admissions of the officers made in the course of their testimony. For purposes of the point we adopt Captain Lie's statements, and, as the sustaining of Judge Bean's decision would obviate the necessity for the court's examination into the 1480 odd pages of the four volumes of the record, we will treat the question of the violation of rule 16 in full before taking up the other issues. In so doing, we do not desire to concede Lie's account of the movements of his vessel from three to three fifteen o'clock to be true, our contention being that his own statement of the case establishes that his vessel, in the manoeuvres in the fog prior to the collision, when the vessels were exchanging fog signals, did violate rule 16, requiring him to stop his engines on hearing the "Beaver's" whistle. Whether or not the violation was the "*efficient cause*" of the collision, it was a *sine qua non* thereof, that is to say the effects of the violation of the rule lasted until the vessels were *in extremis* and the collision would not have occurred had the rule been obeyed.

The vital point here is that *up to the very moment the vessels were in extremis* the "Selja" was driven continuously on a course approaching the course of a

vessel from San Francisco, whose bows she knew she must cross, as the result of working her engines for ten minutes in violation of a rule requiring her to stop them and not thereafter navigate at above steerage way. She reached that point only by virtue of a power exercised in violation of the statute. If the statute had not been violated, she would not have *just arrived* at the danger point when the "Beaver" came in sight. The violation of the statute, whether or not it was the "efficient" cause of the loss, was the "*sine qua non*" thereof. It can be truly said that "but for" the violation of the statute, the effects of which continued till the vessels were *in extremis*, the collision would not have occurred.



## I.

Judge Bean's decision is squarely sustained by the leading American and English cases, "The Admiral Schley", "The Georgic" and "The Britannia". The "Selja" violated rule XVI ten times in not stopping her engines on hearing the first ten whistles of the "Beaver". If she had stopped her engines she would not have reached within thousands of feet of the crossing point of the courses of the two vessels when the "Beaver" passed and the collision could not have occurred. Instead she was broadside on, moving across the bows of the "Beaver" at the moment of impact.

The second paragraph of rule XVI provides:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." (26 Stat. 320, Art. 16.)

As we will more fully develop, if a vessel violate this rule requiring stopping on hearing the opposing whistle, or any one of the specific injunctions of the International Rules,\* and a collision occur, she will be held liable unless she can show that the collision would have occurred *even if she had obeyed the rule*. The burden is on her to show not only that her act did not *cause* the accident, but that it could not have contrib-

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\* Unless excused by the Emergency Rule 27, which is not claimed here.

uted to the accident. It is not enough that she show that her violation of the statutory rule was not the *causa causans* of the collision, she must show that it is not a *sine qua non*. Indeed the rule goes even further. She has the burden of showing this not only by the preponderance of the evidence, but she must show that the violation "*could not by any possibility*" have contributed to the collision.

We shall show that the "Selja" violated rule 16 and that she not only cannot maintain the burden of proof placed by the law upon her to show beyond doubt that the violation did not contribute to the collision, but shall ourselves assume the burden and show affirmatively that, if she had stopped her engines in compliance with the rule, the collision would not have occurred.

The testimony of the "Selja's" officers establishes the following facts, essential to their case, which for the purposes of this section\* we take as true:

(a) At 3 p. m. while in a dense fog, the "Selja" heard the "Beaver's" whistle at first apparently dead ahead and then broadening on her port bow and continued to hear her five second automatic blast, always thereafter at the same bearing on the port bow, at 55 second intervals for fifteen minutes and until the collision;

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\* In our succeeding sections we set forth what we believe the evidence shows really to have occurred. And this is our answer to counsels' challenge as to which set of facts we rely on. Admitting what they assert, the "Selja" was in fault and liable. If the court finds the real facts she is equally liable.

(b) At no time till 3:15 was the "Beaver's" position ascertained by the "Selja's" officers. They did not know either the distance to the "Beaver", or the course on which she was proceeding. For ten minutes, that is until 3:10, they did not know the whistle came from a vessel but thought it might be a fog whistle at Point Bonita, over 24 miles away, and seven and a half miles easterly of their course.

(c) At 3 p. m. the "Selja" was on a course of S. 65 east, steering straight for the lightship off San Francisco. The "Beaver", as appears from the testimony of her officers, was on her regular northerly trip to Portland, steering N. 86 west, straight from Duxbury Reef to her next departure off Point Reyes. The vessels, according to the admissions of each, continued on these two courses till they were *in extremis*. From the beginning, the "Selja's" officers were charged with knowledge that she was in all likelihood on a course crossing the course of a vessel coming out from San Francisco on the regular trade route up the coast around Point Reyes.

(d) The "Selja" at 3 p. m. was 6080 feet from the point where the two courses crossed (libelant's Ex. 1).

(e) The "Selja" was proceeding at 40 revolutions, or 6 knots an hour at 3 p. m. and, according to libelant's Exhibit No. 1, continued at 6 knots till 3:05, covering 3040 feet towards the crossing point of the two courses. That she dropped her revolutions at 3:05 to 20 revolutions and continued at diminishing speed till she had reduced to 3 knots at 3:10 p. m., covering in

the second five minutes 2075 feet. That she then continued till 3:15 p. m., at which time she had just come to a standstill (Lie, page 173), having covered, in the last five minutes, 1015 feet. In all, according to libellant's Exhibit 1, she traveled after 3 p. m., 6080 feet towards the point of crossing of the two courses. Just as she came to a standstill, the "Beaver" emerged from the fog 900 feet distant. Both vessels were then *in extremis*, and the "Selja" began backing at right angles across the "Beaver's" bow (page 424) and moving not to exceed 100 feet astern.

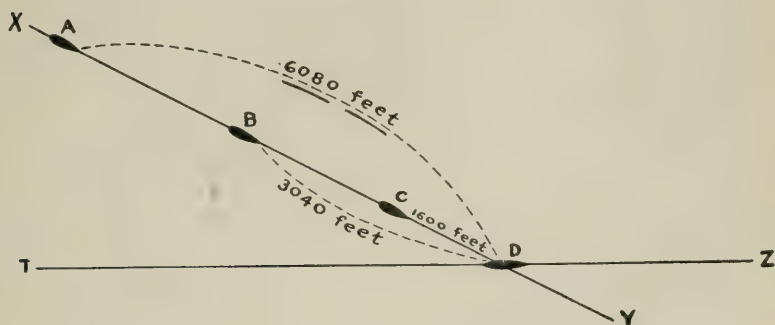
(f) If the "Selja" had stopped her engines at 3 p. m., on hearing the "Beaver's" whistle, as required by the rule, and kept them stopped till 3:15 p. m., when she ascertained the position of the "Beaver", she would have covered less than 2075 feet between 3:00 and 3:05, 1015 feet between 3:05 and 3:10, and have been dead in the water from 3:10 on. While she was thus lying dead, the "Beaver" would have safely crossed her course at *some time between 3:15 and 3:16*, not less than 3040 feet distant from her.

(g) The "Selja's" steerage way for the conditions of that day was under two knots (page 248). If, instead of coming to a standstill in the water, the "Selja" had stopped her engines at 3:00 p. m. and kept them stopped till her speed had dropped to her steerage way, i. e., under two knots, 200 feet per minute, she would undoubtedly have reached this rate at 3:08, having covered not more than 2775 feet; if her engines had been started and had she continued at her steerage way



of less than 200 feet per minute, she would not have reached the point where the courses crossed till 3:24, or over eight minutes after the "Beaver" had passed by in safety some 1600 feet ahead of her.

The situations then are illustrated by the following diagram:



XY "Selja's" course S. 65 east.

TZ "Beaver's" course N. 86 west.

A "Selja" at 3 p. m. when she hears "Beaver's" fog signal on her port bow and hence indicating a vessel coming from San Francisco, whose course she was crossing in steaming for the light-ship.

B Where "Selja" would have been at 3:16 when "Beaver" crossed her course at D if she had stopped her engines till she had ascertained "Beaver's" distance and course—i.e., 3040 feet from "Beaver" at 3:16.

C Where "Selja" would have been at 3:16 if she had dropped to steerage way—1600 feet from the "Beaver".

D "Beaver" at 3:16 crossing "Selja's" course.

The exact question as to rule 16 presented by this case has been decided by both the American and English courts and in both jurisdictions the decisions were based on the sole fact that but for the violation of the rule and failure to stop the engines, the offending vessels would not have reached the crossing point of the two courses and the collision would not have occurred.

The most important of these cases is *The Admiral Schley*, 42 Fed. 67, decided by the Circuit Court of Appeals of the First Circuit, Judge Putnam writing the opinion. In this case both vessels failed to stop their engines, thus violating rule 16, the Schley coupling with it excessive speed and the absence of any lookout at her bow. As in our case, her fault was practically conceded and the question was whether the Mayer's violation of the rule also made her liable. The court goes on to say:

"In regard to the fact that the 'Schley' did not stop as she should have done when she heard the first faint whistle from the 'Mayer', as the last paragraph of the International rule 16 required her to do, the 'Mayer' violated the same rule. Consequently, on this point, the vessels were mutually at fault; while, moreover, inasmuch as the 'Mayer' ran her bow into the 'Schley' under such circumstances that it is clear that, if she had run a few feet less, there would have been no collision, it is equally clear that if either vessel had obeyed the International Rules no injury would have resulted. It is true that it is sometimes difficult for a tug having a long tow to stop; but in this case the difficulty was of the 'Mayer's' own making.

"Therefore, so far as rule 16 is concerned, not only must each vessel be held guilty of a contributory fault, in accordance with *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148, but it is also apparent that, *except for* the mutual fault of both vessels in this respect, there would have been no occasion for this litigation. It follows that the judgments heretofore entered by us must be renewed."

*The Admiral Schley*, 142 Fed. 64, at 67.

The decision of the Circuit Court of Appeals in *The Schley* case meets every argument of our opponents. It holds squarely,

(1) That under article 16 the vital question is, admitting that the one vessel is plainly in fault for excessive speed and other offenses, would the other vessel, which failed to stop her engines as required by the rule, have reached the crossing point at the same time as the first, if she had stopped them on hearing the first whistle.

(2) That, if a vessel steaming in a fog fails to stop on hearing the first *faint* whistle of another vessel forward of her beam, she is liable as a contributor to the collision which subsequently ensues.

(3) That the "except for" or "*sine qua non*" rule still exists as it was laid down by the Supreme Court in *The Pennsylvania*, 19 Wallace 125, 136 (the Court of Appeals refers to the exact page, 136, on which this rule is stated), and that it is applicable to a violation of rule 16 even though the violation is not the "efficient cause" of the loss.

Application for certiorari was made to the Supreme Court where it was refused.

*The Admiral Schley*, 201 U. S. 648.

The Supreme Court must therefore have adopted its reasoning.

*McMaster v. New York Life Ins. Co.*, 99 Fed. 856,  
at 861.

In any event is a persuasive authority on this court until the Supreme Court has overruled it.

The rule in *The Pennsylvania* case on which the Circuit Court of Appeals relies, is as follows:

“Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in *any degree* it was the cause of the vessels *coming into a dangerous position*. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. *Such a rule is necessary to enforce obedience to the mandate of the statute.*”

*The Pennsylvania v. Troop*, 19 Wall. 136; 22 Law. Ed. 151.

The significant part of this statement of *The Pennsylvania* rule is that while there is no liability if it clearly appears that the violation of the statute could have nothing to do with the disaster, the violation is considered necessarily to have something to do with it if “*in any degree* it was the cause of the vessels *coming into a dangerous position*”. In the case at bar our opponent frankly admits that ten times did his vessel fail to stop her engines on hearing the “Beaver’s”



whistle and that the power of her engines during that period was driving her on a course which she knew in all likelihood would cross the bows of the "Beaver" and continued to drive her on to a most "dangerous position", i. e., squarely before the "Beaver" and so placed that as soon as she began to reverse she would be broadside on. Can it be said in the case at bar that the failure to stop in violation of the rule did not "in *any* degree cause the vessels to come into a dangerous position"?

The two vessels met at right angles and although thus squarely before the bows of the "Beaver" the "Selja" lays much emphasis on the claim that she was moving backwards at the moment of the impact. Such a consideration when the vessels were *in extremis* would have no weight, even if the question did not concern the violation of the specific injunction of a statute but merely involved the exercise of the discretion in navigation and hence was one of efficient causation. The "Selja" was not backing *away from* the "Beaver" but across her bows. The result of her forward movement in violation of the rules would not be overcome till her backing actually took her away from her opponent.

Another American case squarely in point applying the "but for" rule to violations of rule 16, is a decision of Judge Hough, the distinguished New York District judge. In that case, as here, the violation in question was more than five minutes before the collision, and yet the violating vessel was held in fault because "the injury would have been avoided if the rule had been

obeyed". His discussion of the rule is most illuminating.

"He first heard the whistle he believes about 10 minutes before the collision, but he repeatedly states that he heard it four or five times, on his port bow and getting closer, *before he stopped his engines*. It is thus positively asserted by both pilots that each distinctly heard forward of his beam the fog signal of a vessel the position of which was not ascertained. Yet Nichols heard that whistle repeated three times, and Dougherty four or five times, before they respectively stopped the engines of the valuable vessels they had in charge. I think this is a plain violation, by the pilot of each vessel, of article 16 of the Inland Rules. That article is mandatory in that it declares that a steam vessel in the position above described 'shall, so far as the circumstances of the case admit, stop her engines'. I see nothing in the circumstances revealed by the evidence which prevented stopping the engines of each vessel. Quite naturally counsel for both steamers have said very little about this point, which is pressed upon the court by the cargo owners. It is asserted as an authoritative declaration that the Supreme Court said in *The Ludvig Holberg*, *supra*, page 68 of 157 U. S., at page 480 of 15 Sup. Ct. (39 L. Ed. 620):

" 'No case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger.'

"Undoubtedly that was the rule under the international regulations of March 3, 1885, article 13; but article 16 of the International Rules of 1890 (identical with the same article of the Inland Rules of 1897) has been differently construed in decisions binding upon me. In *The St. Louis*, *supra*, the Circuit Court of Appeals for this circuit held a much less flagrant violation of this article ground for the application of the rule:

“‘That whenever it appears that one of the vessels (in collision) has neglected the usual and proper measures of precaution the burden is upon her to show that the collision was not owing to her neglect.’ 98 Fed. 752, 39 C. C. A. 263.

“In *re Clyde S. S. Co.* (D. C.) 134 Fed., at page 97, it was held that a failure to observe the precaution imposed by this article ‘creates a presumption of fault’; and the same rule was applied in *El Monte*, 114 Fed. 796. In the case last cited at page 800 is a reference to the proceedings of the Maritime Conference which adopted this rule, and I entirely agree with Judge Adams that it was put on the statute book on the recommendation of that conference in order that stopping at the first whistle should be imperative and because the conference and the legislature did not wish ‘to leave too much to the navigator’s judgment’. Any violation thereof should in my opinion create a very strong presumption of fault, and cast upon the offender the burden of showing by clear testimony that his error did not contribute to collision and subsequent damage. The rule is very forcibly stated in *The H. F. Dimock*, 77 Fed. 230, 23 C. C. A. 123, and I perceive nothing opposed to it in *Dunton v. Allan S. S. Co.*, 119 Fed. 590, 55 C. C. A. 541, for in that case it plainly appears that the engines of the steamship were stopped ‘immediately upon hearing’ the first sound signal of the vessel with which she afterwards came in collision. Thus a presumption of fault attaches to both vessels for violation of the statutory rule. Neither has borne the burden laid on her thereby. On the contrary, the moderate speed at which each was going when the other’s whistles were heard, and the narrow margin by which the bounds of safety were overstepped, are proof conclusive that, even with the Finance on the wrong side of the channel, *injury would have been avoided if the law had been obeyed.*”

*The Georgic*, 180 Fed. 863 at 870 and 871.

The "Selja" was a Norwegian ship, the "Beaver" an American; the collision took place on the high seas and is therefore controlled by the International Rules adopted by all the maritime nations. Rule 16 controls in Great Britain and in the absence of *The Schley* case her decision on a far stronger case in favor of the vessel violating the rule which occurred *ten minutes earlier* than with the "Selja" would be a powerful authority with American courts.

The following excerpt from *The Britannia*, 10 Asp. Maritime Cases, 68, states better than any summary of ours the treatment of the rule in England:

"In this case the defendants say: 'Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period' and made it out, we did stop our engines, *and kept them stopped for some ten or fifteen minutes*'. It was argued that having stopped so long as that, it could not have made any difference if the engines had been stopped when the whistle was first heard.

"That is an argument which one cannot possibly agree with. One might feel some difficulty in dealing with such an argument if one was not bound by rules and was free to consider mere contribution to the collision, though even in that case it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But the rules have been dealt with over and over again and, before one can acquit them of blame, *one must see that the nonstopping could by no possibility have contributed to the collision*.

"In this case, if the *Britannia* had stopped her engines in the first instance, *her progress would have been stopped* and she would not have reached



the place of collision at the time she did, and the other vessel would have gone across her bows."

*The Britannia*, 10 Asp. Maritime Cases, 68.

In *The Britannia* case the failure to stop the engines occurred more than fifteen minutes before the collision. In fact, after the failure to stop them at first, they were later "stopped for some ten or fifteen minutes". The court holds the *Britannia* liable because:

"In this case, if the *Britannia* had stopped her engines in the first instance, her progress would have been stopped, and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."

*The Britannia*, 10 Asp. Maritime Cases, 68.

The first whistle was evidently as "faint" in *The Britannia* case as in *The Schley* case and the case at bar. The same excuse was offered as that of Captain Lie here, namely, that the whistle sounded a long way off. The English court disposes of this contention, finally we think, in the following language:

"If one were to hold that upon hearing a whistle which sounded to be distant a vessel was justified in not stopping, although its position was not ascertained, except that it sounded a long way off, every case in this court would be that the whistle sounded such a long way off that those who heard it were justified in not stopping the engines.

*The Britannia*, supra.

Our opponent labored vigorously to show that in England the law of causation where a rule had been violated by one of the colliding ships, was different

from that laid down in *The Pennsylvania* case and other American authorities. He seems to contend that in England one has but to show that the *fault* has been committed and the offending vessel cannot escape liability under any circumstances in an English court.

The English authorities clearly show him in error as to this. *The Pennsylvania* rule is identical with the law as laid down in the English decisions at the time that case was decided (1874), and has been the law ever since.

In *The Britannia* case itself, the rule of causation invoked by the court is identical with that of *The Pennsylvania*. We print the two in parallel columns:

“But the rules have been dealt with over and over again and before one can acquit them of blame, one must *see that the nonstopping could by no possibility have contributed to the collision.*”

*Britannia*, 10 Asp. 68.

“In *The Pennsylvania v. Troop*, 19 Wall. 125, it was said that ‘in such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been*’. The court asked whether it could be said that ‘the absence of a mechanical foghorn could not *by any possibility have contributed to the collision?*’, and answered ‘We think not.’”

*The Martello v. Willey*,  
153 U. S. 70.

The House of Lords in construing the Act of 36 and 37 Victoria, which is identical in effect in the statutes 57 and 58 Victoria, controlling in *The Britannia* case, says:

“The presumption of culpability may be met by proof that the infringement *could not by any possibility have contributed to the collision.*”

*The Duke of Buccleugh*, 7 Asp. 68 (1891).

The Court of Appeal says, in an opinion in 1907:

“I therefore come to the conclusion that the Anselm was to blame in these three respects (violations of statutory rule), and that as regards two of them, namely neglect to give sound signals, ‘when porting and when reversing—it is quite impossible to come to the conclusion that they had no effect upon the collision’.”

The lower court had held the Anselm without fault on the ground that “the infringement of the rules had no possible effect upon the collision”, to adopt his own words.

The decision was reversed on the reasoning given above.

*The Anselm* (1907), 10 Asp. M. C. 438, at 441.

The rule is similarly laid down and applied in the following:

*The Corinthian* (1909), Ct. of Appeal, 11 Asp. 264, at 269;

*The Pitgaveny* (1910), 11 Asp. 429, at 433;

*The Reginald* (1907), 10 Asp. 519, at 521;

*The Aristocrat* (1907), 10 Asp. 567, at 573.

It is thus apparent that the court in *The Britannia* case was applying, and properly applying, to the facts of that case the same rule that the Court of Appeals applied in the case of *The Schley* that Judge Hough applied in *The Georgic* and which Judge Bean applied here.

The facts in all four cases are the same. In each, if the steamer had obeyed the rule and stopped her engines, she would not have reached the point of colli-

sion. Judge Bean's decision is clearly in accord with the Circuit Court of Appeals for the First Circuit, Judge Hough, and the English Admiralty Court.

As significant is the fact that there is not a single decision which the industry of either of our opponents or ourselves can discover which holds contra to the above authorities, where rule XVI has been violated and "but for" its violation the collision could not have occurred.



## II.

**The Pennsylvania "but for" rule still controls violations of statutes and determines liability entirely apart from questions of proximate causation.**

It was suggested that *The Pennsylvania* rule no longer exists and that despite its ancient potency we must now look to the facts to determine whether the contribution is something more than a *sine qua non* of the loss. The best reply to this is *The Schley* case itself, decided in 142 Federal, in the year 1905.

Both Judges Hanford and De Haven have given decisions reaffirming the doctrine within recent times. Judge Hanford's decision is probably the most striking of any of them. He says, repeating the language of *The Pennsylvania* case:

"This was repeated and declared to be the settled rule in collision cases by the Supreme Court in *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 422, 10 Sup. Ct. 934, 34 L. Ed. 398. The same rule was again reiterated in the case of *Belden v. Chase*, 150 U. S. 699, 14 Sup. Ct. 264, 37 L. Ed. 1218."

*The Admiral Cecille*, 134 Fed. 673, at 677, 678.

In that case the *Multnomah* was found in fault for excessive speed. The question was whether the *Cecille*, who was moored, without permission from the harbor master, in a certain place in the harbor of Tacoma, thereby committed a fault contributing to the collision. She was anchored at a place entirely proper if she had a written permission from the harbor master, but forbidden otherwise. The *Multnomah* was therefore

charged with knowledge that she might be there and to look out for her. The court says:

“There is no probability whatever that the accident would have happened if the ordinance had not been violated by anchoring the bark in that part of the harbor which I have referred to as the prohibited zone. It is true that, if a permit had been applied for, it might have been granted by the harbor master; but it is not fair to assume that he would have granted such an application, and it is sufficient for the purposes of this case to find that the permit was not obtained, and without it the bark was prohibited from anchoring at the place where she was anchored.”

*Id.* 677.

Now it is apparent that it would not have made the position of the *Cecille* any more or less a contributing cause of the collision if her captain had had the piece of paper granting the permit to berth at that point. But the court, applying the “but for” rule of the Supreme Court in *Belden v. Chase*, *Richelieu Nav. Co. v. Boston Ins. Co.* and *The Pennsylvania*, referring to all of these cases, holds that the bark was liable, because “but for” her presence where she was in violation of the statute, the collision would not have occurred. So of the “*Selja*”—but for her failure to stop her engines she would not have met the “*Beaver*” at 3:16 p. m. and the collision would not have taken place.

Judge De Haven applied *The Pennsylvania* rule in *The Dauntless*, 121 Fed. 420, at 421.

In 1901, *The Pennsylvania* was applied by the Circuit Court of Appeals for the Fourth Circuit in the following language:

“The present international rules require sailing vessels to use the fog horn ‘in fog, mist, falling snow or heavy rain storm, whether by day or night’. The old rule (Rev. St. § 4233) required the signal to be given in fog or thick weather. The first revision (1885; 23 Stat. 438) made it in fog, mist or falling snow. The last revision (26 Stat. 320) added ‘heavy rain storms’. This rule is imperative and was not observed by the schooner. This puts her in fault. *In the absence of all testimony on the part of the steamship*, it cannot be ascertained how far this omission on the part of the schooner contributed to her sudden appearance. Nevertheless, the positive breach of the statute puts her in the wrong. ‘Where a vessel has committed a positive breach of a statute, she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not do so; that it could not have done so.’ *The Pennsylvania*, 19 Wall. 126, 22 L. Ed. 148.”

*Merchants & Miners Transp. Co. v. Hopkins*,  
108 Fed. 890, at 894.

The Sixth Circuit also recognized the continuance of the rule in 1909, in (C. C. A.) *Hawgood Transit Co. v. Mesaba SS. Co.*, 166 Fed. 697, at 702.

The Fifth Circuit also in 1907, in (C. C. A.) *The Ellis*, 152 Fed. 981.

We do not deem it necessary to dwell on the elementary legal distinction between the *efficient* cause and the *sine qua non*. We ask, however, what was the use of Congress substituting rule 16 for old rule 18, which gave the master the discretionary control of his engines, if under the new rule we say, you still have discretion not to stop your engines until ten minutes after the time designated by the statute, in an attempt to ascer-

tain whether you are listening to a land fog whistle or an opposing steamer.

Unless rule 16 is mandatory and unless the punishment of the violation is made certain beyond the casuistries and disputes as to *proximate* causation, the change from rule 18, which controlled *The Umbria* to which we later refer, to the definite command of the later enactment, is a delusion and a sham.



## III.

**Further consideration of Rule 16. The "Selja" invokes the old rule existing prior to the passage of rule 16, which permitted the captain to determine when danger of collision in a fog required the stopping of the engines. Rule 16 determines the danger zone as being entered as soon as the whistle is heard from an unascertained position.**

We have already shown that the "Selja's" failure to stop her engines was a *sine qua non* of the collision—that is, without this contribution to the chain of events leading to the disaster, it would not have occurred. The "Selja" makes as one of its answers to this that her non-stopping was not a violation of rule 16 because she had "ascertained" the position of the "Beaver" within the meaning of the rule.

The second paragraph of rule 16 provides:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." (26 Stat. 320, Art. 16.)

It is counsel's contention that the rule leaves to the captain's discretion, after he has heard the opposing whistle, and does not know whether it is dead ahead or two points on his bow, whether it is moving from starboard to port, what the course of the opposing vessel was at any time till they were *in extremis*, whether it was two or twenty-five miles away, or even whether it

is a steamer or a foghorn, to determine that the position of the "Beaver" is ascertained and continue his vessel on towards the approaching whistle so ascertained (sic) for ten minutes, hearing her ten repeated blasts ten times before he stops his engines.

The libel alleges the hearing of a signal "seemingly dead ahead". The evidence shows the fact that the signal came a little on the port bow, and that the sound came nearer and nearer as the "Selja" moved ahead. It is admitted that the "Selja's" engine was not stopped until *fully ten minutes after the first signal* and then it was not stopped in obedience to any rule, but because, *in the face of danger of collision*, Captain Lie, as he says, thought it good seamanship to do so. Captain Lie was asked by his counsel:

"Q. Why didn't you stop your engines when you heard the first whistle of the 'Beaver'?"

A. Well, because the sound was located as good as could be located in a fog and showed absolutely no danger of a collision." (Lie, 164.)

As, admittedly, it came from nearly dead ahead, a most dangerous quarter, we must assume that the captain deemed that its distance was so great as to preclude likelihood of collision at the time.

Captain Lie judged the location as well as he could in a fog, and *on that judgment*, based on a single blast of the whistle, assumed there was no danger of collision. *The event showed gross error.*

Counsel further inquired:

"Q. Why did you stop your engines at 3:10 p. m., November 23rd?"

A. I only call that good seamanship to do so. *I had then not only located the ship carefully, but I had also ascertained her course as near as it could be, and I stopped the engines just because it was good seamanship to do so.*

Q. Did you stop the engines at 3:10 because of Article 16?

A. No, sir." (p. 170-171.)

Now, compare Lie's cross-examination on these important facts:

(a) Take his statement that he had, at 3:10, "*located the ship carefully*".

See page 1172 of Lie's evidence and read:

"Q. You recollect testifying three times, do you not, that you did not know it was a vessel until 3:10? A. Yes, I remember."

(b) Take his statement that he had "*also ascertained her course at 3:10*".

See page 1171 of Lie's evidence and read:

"Q. Did you think of her course *at all* as you came ahead during that time?

A. I commenced to think of the course *after I stopped my vessel*, yes, sir. \* \* \* I said after I stopped my vessel, I commenced to think.

Q. Well, it is apparent you could not know what her course was if you did not know whether it was a vessel or not; that is right, is it not?

A. Yes, sir.

Q. Do you recollect testifying that, coming out of the fog, you could not tell what course the 'Beaver' was on until she had shown up in the fog? A. Yes."

See also page 1172:

"A. Up to the time the 'Beaver' showed up in the fog, I could not tell what her course was.

Q. That was 3:15, was it not?

A. That was 3:15. I did not know what she was heading *then*. She may have been heading anywhere at that time."

Again:

"Q. How long was it after 3:10 before you sighted the 'Beaver'?"

A. Five minutes.

Q. How were the engines going from 3:10 to 3:15? A. Stopped.

Q. When did you stop them? A. 3:10.

Q. What was the speed of the 'Selja' when you stopped the engine?

A. Three knots".

At page 1162, he says, three and a half to four knots, and in his log, four knots (Lie, 285). These admissions are a sufficient contradiction of the truth of the captain's statement that at 3:10 he had "located the ship carefully", and had "ascertained her course as near as could be".

Captain Lie also said that the whistles which he heard after the first whistle did not vary his judgment as to the "Beaver's" bearing and distance, and that if he had stopped his ship, he would not have thereby in any degree been assisted in more accurately judging them, because, as he repeats, he heard it "as good as it could be located in a fog at that time, and there was no local noises on my vessel" (Lie, 17).

This evidence is brought forward with the object of showing that the position of the "Beaver" at 3 o'clock, after the first whistle was heard, was "ascertained", and that consequently, under the rule as the libellant reads it, the "Selja" was not called upon to stop her



engines. It is summed up by Captain Lie in the following:

“Q. Then your idea is that you should navigate with caution before stopping the engines; that is correct?

A. If you have not located the whistle, well then you have to stop, but if you have located the whistle, *as far as it can be located in the fog*, well, then you do not have to stop, in my opinion” (Lie, 299).

If a master uses his judgment on hearing one blast and reaches a conclusion, right or wrong, Captain Lie seems to think that “ascertainment” within the rule has been reached, so as to justify going on.

Now, we have seen in the opening pages of this brief that at 3 o'clock the “Beaver” was supposed by Captain Lie to be *the fog signal at Point Bonita*, and that her whistle was supposed to come from the land. We beg to repeat:

Captain Lie was asked in his cross-examination:

“Q. You recollect testifying three times, do you not, that you *did not know it was a vessel until 3:10?*

A. Yes, I remember” (Lie, 1172).

See Lie, page 278:

“Q. I say, you did not know whether or not the whistle of a steamer or the whistle of the fog-horn off Golden Gate; that is correct, isn't it?

A. That is correct, I did not know exactly.

Q. Did you know up to 3:05 whether it was a ship four miles away or a foghorn twenty miles away? A. *I did not.*”

At pages 279, 280:

“Q. Would you still claim that this whistle was in a definite ascertained position at 3:05?

A. The *bearing* was definitely ascertained, yes.

Q. The distance from you, was that definitely ascertained at 3:05?

A. It was not exactly, but it was absolutely out of danger of collision.

Q. I am asking you with reference to the ascertainment of the position of the ship. Do you claim at 3:05 o'clock that the *position of the ship* in the water was ascertained to you?

A. *As good as it could be in the fog.*

Q. Did you know within fifteen miles of the distance at 3:05?

A. I did not think of the distance at that time, *but I had that in my mind, as I said, Golden Gate \* \* \** She proved to be much nearer than I thought".

See page 281:

At 3:05 the captain testified "we were approaching the *foghorn*, yes" (Point Bonita foghorn).

See page 281, 282:

"Q. Captain, you said as nearly as can be determined in the fog. Do you mean to say it is any more difficult to determine the location of sounds in a fog than in clear weather?

A. No, it is the same, the sound. But I mean where you locate it in daylight you see it.

Q. In other words, the fog does not have any effect at all, according to your theory, on the transmission of sound through the air?

A. No, sir.

Q. It does not make any difference whether the fog is thick or thin?

A. It does not, to my knowledge."

We submit that the reading of the rule and the cases decided under the rule, the reason for its adoption and a comparison of its provisions with those of the old rule. all condemn Captain Lie's interpretation of its provisions.

### The Rule.

The rule commands a steamer to stop, if she shall hear forward of the beam “the fog signal of a vessel, *“the position of which is not ascertained”*”. This rule cannot be read to mean that, after hearing a whistle forward of the beam, the ship shall stop, unless she shall have ascertained *from that whistle* the position of the vessel giving it, and that, if she has so ascertained it, she may proceed on her way. It must be read (as its very words say) that, *except in the case of a vessel whose position is already ascertained*, any ship hearing a whistle forward of the beam *shall stop* her engines. This obviously must be done for the purpose of such ascertainment. It appears by many cases construing the rules that, after stopping, a ship *shall wait until*, after the exchange of repeated whistles, each shall know the position and intention of the other. Why should this precaution of repeatedly whistling be required after stopping, if the rule means to say that the position and course of the oncoming ship may be determined off-hand from the first, unexpected whistle coming suddenly out of the darkness? *To tell distance, direction and course on hearing one blast lasting a few seconds is manifestly impossible.*

An instance of the meaning of “ascertained” in the rule is found in *The Oravia*, 10 Asp. 434. In that case, the ships *had seen each other* immediately prior to the entering of a fogbank by one of them on a course which, on the supposition that she would not change her course, did not involve risk of collision. The other, afterwards, heard a direction whistle, from the fogbank, but did not

stop her engines. She continued her speed while in the open, and entered the bank at the same speed. These acts were charged as faults. The opinion of the court is epitomized in the report of the appeal in the House of Lords, which affirmed the decision that the failure to stop was not a fault (10 Asp. 525):

“The Court of Appeal held that on the special facts of the case, *inasmuch as the position and course of the Oravia were ascertained before she was hidden by the fog* so that the vessels would pass clear port to port, the Nereus did not act wrongly in continuing her speed and in not sounding her whistle sooner.”

The court will note that we have described the signal given by the Oravia as a *direction* signal, not a *fog* signal. Marsden, in the last edition of his work, emphasizing a true “ascertainment” under the rule, says:

“It is submitted that had the *Nereus*, in the circumstances, heard a fog signal from the *Oravia*, instead of the port helm signal, she would still have been justified in not stopping, the position of the other vessel having been *ascertained* within the article.”

*Marsden on Collisions*, 6th Ed., p. 380.

Here the position had been ascertained by actual sight immediately before the fog shut down. Good seamanship was, in the court’s opinion, determinable by the acts of the Nereus in view of the fact that she had positively, *by such sight*, ascertained the Oravia’s position, and the Court of Appeal went so far as to say (having in mind that the Oravia had also seen the Nereus):



“in fact, if the *Nereus* had stopped or altered, except under some necessity, she might have hampered or impeded the maneuvers of the other vessel.”

*The Oravia*, 10 Asp. M. C. 436.

Mr. Hall, British delegate to the International Marine Conference which framed the rule, afterwards adopted by all the nations, said on this point:

“But so long as the whistle appears to be before the beam, then, of course, it is necessary *to find out* the position of the vessel *which is not ascertained*. These vessels often travel in company. A steamer may have a steam vessel bound in the same direction as herself and she may be using her signal whistle continuously exchanging signals and the officer *would then know practically* the position of that ship. It would then not be necessary for her to stop.”

*Protocol, Int. Mar. Conf.*, Vol. 1, p. 455.

These considerations gain more force when we read the rule in the light of the reasons for discarding the old rule. The old rule, Article 13 (23 St. 441), consisted solely of the first paragraph of the present rule 16.

Art. 13. “Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.”

A ship's duty in approaching another, whether in the fog or otherwise, was provided for by

Art. 18. “Every steamship when approaching another ship *so to involve risk of collision*, shall slacken her speed, or stop and reverse, if necessary.”

Under these now superseded rules it was held by the Supreme Court:

(a) That the mere hearing of a fog signal ahead did not require the ship hearing it to stop at the moment.

*The Umbria*, 166 U. S. 412;

*Ludvig Holberg*, 157 U. S. 480.

(b) That the rules of 1885 (to stop, etc.) in the case above set forth “are obligatory upon such vessels approaching each other from the *time the necessity for precaution begins*”, i. e., when “risk of collision is involved”.

*The Wenona*, 19 Wall. 41, 51;

*The Nicholls*, 7 Wall. 656;

*The Johnson*, 9 Wall. 146;

*The Dexter*, 23 Wall. 69.

(c) That under Article 18 of the rules of 1885,

“it was his (the master’s) duty to slacken her speed, or to stop and reverse, if necessary, *only* if her approach to the other ship involved risk of collision”.

*Ship Blue Jacket*, 144 U. S. 371, 391.

The vice of the old rule which was expounded by the Supreme Court in the case cited was that, under its sanction,

1. A steamship was allowed, after hearing the whistle ahead of another ship, *to proceed* in a fog at a moderate speed *unless her approach should be seen to involve risk* of collision. If repeated signals should indicate further nearing of the ship, then, but not before, she should stop and drift until the approaching

steamer came in sight or, if necessary, she should reverse.

In other words, a ship, though aware of the presence of another, was allowed to keep on in the dark, and *to judge, as she went along at a moderate speed, what her movements ought to be.* All of these movements were necessarily based on information gained from whistles coming out of the fog, while both ships were under way, changing their positions and making confusion possible. It follows, of course, that under such a rule, in a case of collision, the master of the vessel charged with making an improper move could, if he had been moving slowly, properly answer that his action had been resolved upon after ascertaining, by careful listening, the direction from which the sound signal of the other ship came. And, legally speaking, if, by reason of sound deflection he had really heard the sound on his port side, though the ship giving the signal was actually on his starboard side, he could not be found guilty of fault, provided he had promptly acted upon the signal *as it came to his ears.* This reasoning was satisfactory to the courts so far as it exempted the master from liability where no fault had been committed, but to those who looked further than the mere execution of an existing rule of navigation, it was most unsatisfactory that ships should be allowed to navigate under conditions *which, notwithstanding obedience to the rules, imperiled life,* provided, of course, better rules could be made. This was done when the new rules were adopted.

The intention of rule 16 to take away from a master the right to proceed at all after hearing the first signal

without first stopping and ascertaining the other ship's position, is conclusively determined by the fact that the old rule 18, cited in *The Umbria*, was left out of the new rules. The old rule read:

“Art. 18. Every steamship, when approaching another so as to involve risk of collision, shall slacken her speed”, etc.

The rule of 1890 failed to make provision for this important condition because *it was the intention of the rule 16 to make it, as far as such a thing could be, impossible that this condition should present itself*. It could not, except in rare instances, present itself, if both ships *should stop* on hearing the first whistle and then, *after ascertaining each other's position*, navigate cautiously until danger of collision should be over. The old rule 18 was omitted for the patent reason that it might present a conflict with the new rule 16 and destroy the operation of the latter. The old rule permitted circumstances to intervene which made collision likely, though no fault might be chargeable. The new rule made collision almost impossible except upon a direct and wilful violation of its specific mandate.

*The necessity and nature of ascertainment.*

2. The danger of running on the faith of mere sounds in a fog has often been expounded.

The case of *The Umbria* says:

“It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance, and while a whistle continues to be heard so nearly ahead, it is manifestly unsafe to assume that she is upon a course that will take her clear.”

*The Umbria*, 166 U. S. 412.



Judge Brown in *The Lepanto*, 21 F. R. 651 at 658, a case involving very large interests, goes with deep learning into the question of the treachery of sounds in the fog and the legal effect of an error. He said:

“*Erroneously locating a vessel by the sound of her whistle in a fog is not, however, necessarily a fault. Sound like light is liable to be deflected from its original course by reflection, refraction or diffraction. When this happens, though the hearer locate correctly the direction of the sound as it comes to his ear, the source of the sound will be in a different quarter. Elaborate experiments on fog signals in this country and in England have established beyond question, apparent anomalies and contradictions in the transmission of sound through the atmosphere and a consequent liability to error as to the quarter in which the sound originates. Although opinions differ as to the comparative importance of the different agencies that produce these anomalies, all the observers agree substantially upon the fact of great aberrations in the course of sound and the audibility of fog signals.*”

The “Beaver”, as appears from the evidence, did not hear the “Selja’s” whistle until two minutes before the collision (Kidston, 798). This is not unusual. Under similar circumstances in another court, where it was shown that only two signals were heard, one at the commencement and one immediately before collision, the court said:

“it must not be overlooked that sound, as is quite notorious, is a very difficult thing to be accounted for in a fog.”

It absolved the ship from blame on this account.

*The Aras*, 10 Asp. Mar. Cas. 360.

“If a sound signal *appears* to come from a certain definite direction, there is no liability for a

failure to make allowance for the deflection of the sound by reason of the fog, *and a vessel is justified in acting upon the apparent direction of the sounds.*”

*Spencer on Collisions*, Sec. 48;

*The Oregon*, 27 F. R. 751;

*The City of Atlanta*, 26 F. R. 456;

*The Lepanto*, 21 F. R. 651 at 658.

Collision, under such circumstances, was inevitable accident. The new rule was intended to change its character. The method of avoiding it was prescribed by rule 16. Since then, collision has become preventable accident.

Perhaps we may be allowed to add the words of Flood, Norwegian delegate at the Conference, the most bitter critic of the then prevailing rules for navigating in fog:

Thus spoke the representative of the home of “Selja”, whose master has never been taught that sounds in a fog are fickle:

“I have seen, when the fog partly lifted, the steam come up from the steam whistle on the port side and I have heard the sound come up on the starboard side. The sound has gone round and followed the openings in the atmosphere and come up on the starboard side. Every practical seaman will agree with me that when he has expected to find a fog signal on the starboard quarter, he has often found it on the port quarter.”

*Protocol Inst. Marine Conf.*, 458, Vol. 1.

Thus, it appears that the old rule, as construed by the courts, was deemed to allow a dangerous latitude. It

left too much to chance, and to the master's judgment which, under its sanction, was *not required to be exercised until risk of collision should be actually present.*

*The object of the new rules was to remove from navigation the dangers which we have referred to. As little as possible was to be left to the judgment of the master as to the location of the sound; the danger of relying on the first whistle that came to the ear was to be eliminated and the ascertainment, by stopping to listen, of the position and course of an oncoming vessel, was to be mandatory. This might require five minutes, or twenty minutes, as the case might be. Rule 16 (par. 2), flexible in its terms, unmistakable in its intention, and commanding in its words, was the result of the Conference. The world has, by legislation, adopted it. It has been construed very often, more often in Great Britain than in this country, and always, we may say, in one way. Indeed, international rules would be of no avail whatever, unless the courts of all of the countries read them alike. The same words cannot be given different meanings, according as a ship enters San Francisco, New York or Liverpool.*

It is now well settled that the requirement of rule 16, that every steamship, on hearing forward of the beam the fog signal of another vessel whose position is not ascertained, *shall stop her engines* and thereafter navigate with caution until danger of collision is past, *is mandatory.* Failure to obey the rule is sufficient in itself to create an absolute presumption of fault.

Captain Lie explained his failure to stop his ship's engines on hearing the "Beaver's" whistle on the

ground that the position of the latter was "ascertained". That fact was more definitely described by his saying that the sound of her whistle was "located as good as it could be *in a fog*". A similar claim of ascertainment was noticed by the court in other cases as "an ingenious argument" but it was not deemed persuasive.

*El Monte*, 114 F. R. 796 at 800;

*The Bernard Hall*, 9 Asp. M. C. 300 at 301.

In *The Umbria*, the Supreme Court held that under certain circumstances it was the object of the old rules that a steamship should reverse her engines and feel her way until the course of the other ship had been *definitely ascertained*; so in *The North Star*, 62 F. R. 71, Judge Taft, speaking for the Court of Appeals, held that the reversal, if necessary at all, should be made so as to "ascertain" *the exact position and course of the other vessel*. Rule 16 in the Norwegian law provides for its application in all cases where the position of the other vessel is not *surely ascertained*" (Lie, 167). "Ascertain", under rule 16, therefore, must be read to mean something more definite than locating a sound "as good as it could be in a fog" on hearing a single blast. No better evidence of failure to locate can be offered than the admitted fact in this case that the result did not disclose whether it was a land signal or a steamer's whistle that was heard, or whether it was three, or twenty miles away.

In *The Bernard Hall*, 9 Asp. Mar. C. 300, the President of the Admiralty Division defined the words "not ascertained". He said:



“An attempt was ingeniously made to argue that in this particular case there was sufficient ascertainment of the position of the *Bernard Hall* to free the *Holyrood* from the obligation under that rule. I have had occasion to consider what was the meaning of those words ‘not ascertained’, and it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. *When whistle after whistle* is heard, the position is ascertained and, therefore, there is no obligation to stop for other whistles, but there is an obligation to stop with regard to the first whistle *because at that time the position is not ascertained.*”

In this case, the *Holyrood* stopped at the *second* whistle. The court said:

“It is impossible to say it would not have been a material matter if she had done so”,

i. e., stopped at the first whistle.

The American cases, as well as the English, recognize the fact that the Marine Conference which recommended rule 16 actually considered the propriety of so framing it as to compel a ship to *stop absolutely, to come to a standstill*, on hearing a whistle ahead. But, as the Protocol of the proceedings shows, it was finally agreed that the rule should require her to stop her engines and then navigate with care. Stopping the engines was directed in order that ascertainment of the other ship’s position should be secured before proceeding further.

Referring to rule 16, the President of the Admiralty Division says in *The Rondane*, 9 Asp. M. C. 108:

“It was an approach to what many persons had advocated at different times—namely, that in a fog vessels should absolutely stop. \* \* \*

“This rule stops short of that. It does not say that a vessel is to stop and never move again in the fog. On the contrary, all she has to do is to stop her engines and then navigate with caution, and she is to do that because she hears forward of her beam a fog signal of a vessel, the position of which is not ascertained. *She is to keep them stopped until she can, by hearing further signals from the other vessel, ascertain the position of that other vessel.* The rule does not say that in terms, but that appears to me to be the meaning. The object, of course, is clear—namely, to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and also to specially call the attention of those on board to the matter, so that they may be more acute to hear a second whistle and to locate it if possible. *Therefore, the duty of a vessel in a fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purposes I have mentioned.*”

If it be necessary that a ship should be brought to a standstill in order that the course of the other be “definitely ascertained”, *this must be done.*

*The Minnesota*, 189 F. R. 706 (Feb. 28, 1911).

In *El Monte*, 114 F. R. 796 at 800, the court says:

“An instructive discussion of the reasons for this amendment occurred when it was being considered in the International Maritime Conference of 1889, showing that the duty of stopping should be made imperative in order to avoid the danger of *leaving too much to the navigator’s judgment.*” \* \* \*

“Here was a vessel, going ahead in a dense fog at the rate of at least six knots, receiving the signal of another whose position and course were only conjectural, and yet kept on, with the result of bringing the vessels together, when an observance of the rule would have avoided danger.”

Judge Hough, of the Southern District of New York, in a late case on the subject, agrees with Judge Adams as to the meaning of the rule and adds:

“Any violation thereof should, in my opinion, create a very strong presumption of fault and cast upon the offender the burden of showing by clear testimony that his error did not contribute to collision and subsequent damage.”

*The Georgic*, 180 F. R. 863 at 871. See also chapter I for further consideration of this case.

In *The St. Louis*, 98 F. R. 750 (C. C. A.), two ferry boats were proceeding cautiously in a fog, sounding their signals. The *St. Louis* heard the Delaware's fog signal and instantly stopped and reversed her engine. The Delaware heard the fog signal of the *St. Louis* but did not stop. She waited *thirty seconds*, heard a second signal, stopped and reversed, giving alarm signals. Collision occurred. The Delaware was held to blame for not stopping on the *first* signal, though she postponed action only *thirty seconds*.

Counsel relies on *The Commonwealth*, 174 Fed. 694, but fails to note that in that case it appeared that:

“The lookout said he reported the whistle and the steamer stopped; that he heard six or seven altogether to which he paid attention; that the first four whistles were ‘one at a time’; that they then came ‘two at a time’ and after the two, another single whistle, which was the last he could remember; that the Commonwealth was in sight at the time of the last signal. The chief officer said he heard a whistle from the Commonwealth ‘about abreast’, ‘right abreast \* \* \* pretty far away’ and they stopped the steamer.”

*The Commonwealth*, 174 Fed. 694, at 700.

So also in *Dunton v. Allan Steamship Co.*, where the court found:

“That the first signal, which was one of two blasts, heard from the schooner, was just a few seconds before she loomed in sight through the fog; that immediately upon hearing these whistles, a signal was given to the engineer to stop, and within a few seconds thereafter, when the schooner loomed up, another signal for ‘full speed astern’ was given, and that almost immediately thereafter, the collision occurred.”

*Dunton v. Allan S. S. Co.*, 119 Fed. 590 at 591 and 592.

This caused the “slowing down” of the vessel. Counsel has failed to distinguish between stopping the *engines* which would slow her down and stopping the ship by reversing. Judge Hough points out this absence of violation of the rule in *The Georgic*, supra, 180 Fed. at 871.

We also refer the court to the following cases, all of which are interesting and directly in point:

*Koning Wilhelm I*, 9 Asp. M. C. 425;

*The Cathay*, 9 Asp. M. C. 35;

*Challenge and Duc d'Aumale*, 9 Asp. M. C. 497;

affirmed Court of Appeals, 10 Asp. M. C. 105;

*In re Clyde S. S. Co.*, 134 F. R. 95.

In *The Britannia*, 10 Asp. M. C. 67, the court said:

“It appears to me that it was the positive duty of those on board the *Britannia* to stop their engines as soon as they heard that whistle for the first time. It is not true to say that because a whistle *sounds distant*, those on the ship hearing it are entitled to treat it as distant. Many cases in this



court have shown that an apparently distantly sounding whistle is really close to. *Again, it is not correct to say that a whistle having been heard, can be located so as to be certain it is at a precise bearing on the bow.*"

Captain Lie's excuse for not stopping was that the apparent distance of the sound "showed absolutely no danger of a collision" (Lie, 164). He admitted afterwards that it proved to be nearer than he thought. His mistake illustrates the necessity and reason of the new rule. If he chose to take a chance, when he might have made sure, *and when the law directed him to make sure*, he cannot ask exemption on the ground of innocent error.

The court remarked (and this bears on Captain Lie's testimony to the same effect, Lie, pp. 169-170):

"In this case the defendants say: 'Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period and made it out, we did stop our engines, *and kept them stopped for some ten or fifteen minutes.*' It was argued that having stopped so long as that, it could not have made any difference if the engines had been stopped when the whistle was first heard. That is an argument which one cannot possibly agree with. One might feel some difficulty in dealing with such an argument if one was not bound by rules and was free to consider mere contribution to the collision, though even in that case it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But the rules have been dealt with over and over again and, before one can acquit them of blame, *one must see that the non-stopping could by no possibility have contributed to the collision.* In

this case, if the *Britannia* had stopped her engines in the first instance, *her progress would have been stopped* and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."

*Id.* p. 68.

These words apply to the "Selja". The "Selja's" master offers, as a justification for his reliance on the first signal and as an excuse for a violation of the rule, the fact that he learned nothing in the later whistles of the "Beaver" which he did not know when he heard the first whistle (Lie, 171); that is, as the facts show, *he knew nothing of the "Beaver's" position at the beginning and he learned nothing later* while he kept under way. In this, we see nothing except a most excellent argument for insisting that he should have stopped and waited until he did learn something. That was the intention of the rule.

Just as appears from the record in the case at bar, which shows the "Selja" to have been steaming rapidly toward the "Beaver", then almost dead ahead, the court, in the case last quoted, said of the facts before it:

"It appears to me that when this vessel, the *Britannia*, was going ahead for four minutes, *she was in fact running into danger the whole time*. She must have been in fact running towards the other vessel the whole time. \* \* \* *I have asked the Elder Brethren whether in their opinion, it was caution and prudent navigation to go on at slow speed, working steadily ahead, for four minutes without making absolutely certain of the position of the other vessel. They think it was not.*"

*Id.* p. 68.

This case presents all the excuses which Captain Lie offers, under circumstances far more favorable to the master of the ship referred to in it than those shown in the case at bar. Captain Lie's statement that he could have gained nothing by stopping his engines is shown to have been founded on gross error. Indeed, it is clear that he devoted *ten minutes* to running forward at great speed into collision with a vessel ahead of him, when under rule 16 every one of these minutes should have been devoted, by stopping and listening, to ascertaining with certainty the then unknown position, distance and course of the "Beaver", or to resolving the unknown character of the whistle.

In *The Aras*, 10 Asp. M. C. 359, 360, the steamship Oakmore was proceeding in "foggy" weather at only *two* knots; a whistle was heard ahead; *her engines were stopped* "and the bearing of the whistle was carefully "ascertained by compass by the master and each of the "officers on the bridge". When the whistle was found to be broadening on the bow, giving apparent safety, the engines were put to dead slow ahead, the Oakmore having come almost to a standstill. After twenty minutes, the Aras appeared, engines were reversed, but a collision occurred. The court held that the Oakmore was at fault for continuing even at dead slow speed, for twenty minutes because:

*"it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this*

was undoubtedly, and is not justified in thinking it is broadening unless he can make sure of it."

*The Aras*, 10 Asp. at p. 361.

*The purpose of rule 16 was defeated by the "Selja's" failure to stop and listen.* Captain Lie says "he had "located the sound as good as it could be located in "a fog and there were no local noises on my vessel" (Lie, 171). He had been reading the cases since his arrival. *The Koning Wilhelm*, 9 Asp. M. C. 428, said:

"If you stop your engines you can hear better than you can when the noise of the engines and propeller is going on."

Said the President in *The Rondane*, 9 Asp. M. C. 108:

"The object, of course, is clear, viz.: to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and, also, to *specially call the attention of those on board* to the matter, so that they may be more acute to hear a second whistle, and to locate it if possible. Therefore the duty of a vessel in a fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purpose I have mentioned."

*Captain Lie fails to state that all the officers and any of the crew were consulted as to the doubtful whistle.* The object of the rule requiring the ship to stop is "also to specially call the attention of those on board "to the matter." Somebody, if all had been consulted, might have suggested that a steamer's whistle blowing at a point *five or ten minutes' distant* was not a *land signal twenty odd miles away*, and by his advice to the master, have prevented him from rushing into danger. This omission in itself, was negligence which the rule was intended to obviate, viz.: the leaving of too much "to the master's judgment".



## IV.

**The Belgian King.**

Thus far, we have not considered the case of *The Belgian King*, 125 F. R. 869, decided in 1902 by the Circuit Court of Appeals of this Circuit on appeal from the decision of this court. It was a case of novel impression under the new rules. Two or three cases had been recently decided in Eastern Circuits and in England, all upholding the mandatory nature of the requirement of rule 16 that on hearing the fog signal, forward of the beam, of a vessel whose position is not ascertained, a steamship must stop her engines, but as the voluminous briefs in the appellate court show, those cases were not presented. They had not reached counsel here. The case has not been cited or quoted from in any case as bearing on rule 16. It is not even found in the table of citations in *Marsden on Marine Collisions*, 6th Ed., the latest text-book. The court will remember that the *Tellus* and *Belgian King* collided in a dense fog. This court held the *Belgian King* to blame, saying:

“The *Belgian King* was doubtless moving at a very fair rate of speed, but she did not discharge her whole duty in slowing down under the circumstances. *She should have stopped when she became aware of the presence of the other vessel, until she ascertained its position and then it would have been easy for her to have avoided the collision.*”

*The Tellus*, 113 F. R. 525.

This court applied rule 16 truly and according to the uniform interpretation put upon it before and since. It was not applied to the *Tellus*, which also failed to

stop her engines, because on the evidence, though it is not so stated, the court must have found that her master, on hearing the first whistle, *had actually ascertained* the position of the Belgian King, a fact that was proved by the event, and that he then navigated with the utmost caution. The Court of Appeals, in affirming the decree, found the same fact in the same way:

“When the whistle of the Belgian King was *first* heard, the position was sufficiently ascertainable by the Tellus to permit her to continue on her course at slow speed and give the direction signal that she was going to starboard.”

*The Belgian King*, 125 F. R. 876.

From the opinions of the two courts, it appears that because the Tellus, on hearing the first whistle, had ascertained the position of the Belgian King, she was not obliged under rule 16 to stop her engines, and because the Belgian King had not ascertained the position of the Tellus, her obligation under the rule was to have stopped at the first signal “while she ascertained its position”. The rule enforced by the court is that enforced in like manner in all the cases. The case did not *condone a fault* in the Tellus when it failed to hold her guilty for not stopping her engines. It held that the condition had not presented itself which required her so to do, *and it held this expressly*. While the rule of the later cases (and they are unanimous) undoubtedly challenges the *sufficiency of the evidence* on which the district and appellate courts based their finding that the Tellus had ascertained the position of the Belgian King, the rule, on the facts, as found, was properly applied by them. In the case at bar, what-

ever the thought of Captain Lie was at the moment that he heard the "Beaver's" whistle, *the fact* was that he had not ascertained the position of the latter. He is not allowed under the new rule to plead an error in judgment.

## V.

**The Umbria and the St. Louis.**

It becomes our duty to point out that the rule of *The Umbria*, though still valuable as an answer to an inquiry as to what is careful navigation, has ceased to be a factor in determining what steamships shall do, or what they need not do, on hearing a whistle ahead in a fog. *A statutory rule has taken the place of the law of the Umbria, which, before the rule was enacted, had declared the judicial idea of good navigation in a fog.* The court, we trust, will indulge us, if we again set forth rule 13 of 1885, and rule 16 of 1890, and give the explanation concerning the character and interest of each which will, as it seems to us, set at rest all doubt as to the proper explanation of the existing rule.

Rule 18 (1885) provides as follows:

“A steamship approaching another *so as to involve risk of collision*, shall slacken her speed, or stop and reverse, if necessary.”

Under this rule, *The Umbria* (166 U. S. 412) and the *Ludovica Holberg* (157 U. S. 60) held that a steamship in a fog was *not* obliged to stop on hearing the first whistle ahead. The duty to slow, or stop and reverse, it was said in *Ship Blue Jacket* (144 U. S. 371, 391), arose “*only* if her approach to the ship involved risk of collision”, and generally, it was decided in many cases that the duty imposed by the rules became obligatory on a ship from the time the necessity for precaution arose, i. e., when “risk of collision” should be involved.

*The Wenona*, 19 Wall. 41, 51;

*The Nicholls*, 7 Wall. 656;



*The Johnson*, 9 Wall. 146;

*The Dexter*, 23 Wall. 69.

A moment's thought will recognize the salient features of the rule, as thus interpreted, to be:

(a) The act of slackening speed, stopping and reversing were required to be done "if necessary". It may be assumed that the necessity would be held to exist, whenever under the circumstances before him, a prudent and intelligent master would recognize its presence.

(b) The judgment of the master, in declaring the necessity to slacken or stop and reverse, was not called for until after he should have determined that there was "risk of collision", or, in other words, that he had reached a place of possible danger. This we may call the zone of possible collision.

The rule, therefore, did not require any specific act to be done, or to be left undone in any given case. It simply imposed the duty of exercising good judgment in all cases. For a failure to exercise such judgment, the master and his owners became liable, under general rules of law, for any damage suffered. We need not add that the burden of proof in all cases of negligence is on the plaintiff to show not merely the act of negligence, but the fact that such negligence contributed to the disaster, that is, to the collision.

All of the cases which we have cited only prove that rule 18 of the Rules of 1885 permitted a ship unreservedly *to enter into and navigate, but with care, in the zone of possible collision up to the moment at which*

*the presence of another vessel should be disclosed.* No difference was made between navigation in a fog, or in clear weather, except at times prior to the presence of risk of collision, that is, when no other vessel was present (Art. 13, Rules of 1885).

In these few words, we have stated the fundamental difference between rule 18 of the Rules of 1885, and rule 16 of the Rules of 1890. It was the object of the new rules to take from the master his liberty to enter a *place of risk*. *It made special provision for ships approaching in a fog, where none had been made before.* When that rule provided that a ship, hearing ahead of her a fog signal of a vessel whose position was not ascertained, should stop her engines, it ordained a course of action the very opposite of that permitted by the Rules of 1885.

*It forbade a ship to enter into the zone of possible collision except after stopping and after ascertaining the position and course of the other ship.* There was no requirement to do a thing merely "if necessary". *The direction to stop* was specific and mandatory. The zone of possible collision was in effect declared to be a place of danger, not to be entered until after stopping and obtaining the information necessary to obviate danger. It needs no argument to show that the "*Selja*" *in being*, whether with or without motion, in that forbidden zone without knowledge of the "*Beaver's*" movements, violated the spirit and letter of the rule just as much as she did in entering it without first stopping, as the rule required. In *The Schley*, 131 F. R. 434, the Court of Appeals condemned the Mayer for being in

the track of vessels outbound from Boston, she being inbound and having no justifiable reason for taking that route. Though she had violated no statutory rule, in this respect the court said:

“Under these circumstances, the burthen rests on her to justify *her locality*, if she can do so.”

There is one matter to which we have not referred. It is the dictum of the court in *The St. Louis*, 98 F. R. 750, in which, in deciding the case, the court enforced rule 16 and held the Delaware in fault for having postponed stopping her engines until thirty *seconds* after hearing the fog signal of the St. Louis ahead. The Delaware claimed that notwithstanding her admitted fault, she had reversed in time to gain a backward motion before the collision. The court said that if this had been, and if the St. Louis had been running at a high rate of speed, the Delaware would not have contributed to the collision (citing *The Umbria*) and would not have been to blame.

In the first place this dictum can have no application to the case at bar because the “Selja”, instead of backing away from the “Beaver”, was moving astern *at right angles across her bows* (245).

That was a case of a head-on collision, the vessels sailing, from the time the St. Louis first heard the whistle, in opposite directions on practically the same course, and hence were in front of one another when Article 16 applied.

If the St. Louis had stopped on hearing the first whistle, she would nevertheless still have been in the

course of the Delaware, and have been struck by her half a minute later. It is thus apparent that if the St. Louis had been backing through the water at the moment of collision, she would not have added anything to the impact, and, as they would have come together in any event, the failure to stop the engines 30 seconds sooner could not have contributed to the collision. In our case, however, the vessels were on *crossing* courses, and if the specific injunction to stop the engines had been obeyed, the "Selja" would never have come in front of the "Beaver" at all, and the "Beaver" would have crossed the intersection of the courses hundreds of feet before her.

As a matter of fact, instead of backing *away*, the evidence shows conclusively that at the moment of impact the "Selja" was backing at *right angles across* the "Beaver's" bows (opening brief, pages 104 to 111) and our opponents' witness, the expert Heynemann, admits that the scars on the "Beaver" bear out this theory (record, pages 423, 424). In *The St. Louis* case, backing in the water at once took her *away* from the opposing vessel, while in our case the backing was directly *across* the "Beaver's" course. Conceding that the backing of the St. Louis would have removed the element of contribution in the case, the backing of the "Selja" certainly did not diminish it in our own.

However, even if the dictum applied to the facts of our case, it is not authority particularly against a statute. The Supreme Court said, in *Carroll v. Lessees*, 16 How. 275, 286-7:

" \* \* \* this court has never held itself bound by any part of an opinion, in any case, which was



not needful to the ascertainment of the right or title in question between the parties”.

When the court in *The St. Louis* case said that, under *The Umbria*, a certain admittedly unproved state of facts would have relieved one of the ships, it stated what was unnecessary to its judgment. Its judgment in that respect carries no authority.

It is, however, worth while showing that the remark was inadvertently made. When *The Umbria* was decided, no statute rule existed which directed the action of vessels in a fog, after hearing a fog signal ahead. Rule 18 merely dictated the duty of a master to do certain things “if necessary”, in all cases involving risk of collision.

In that case, it appears that the steamer *Umbria* was running at a very high rate of speed in a fog. The steamer *Iberia* was going at a moderate speed. Whistles were heard. The *Iberia*, in an effort to turn away from the oncoming ship’s apparent course, changed her own which thereby became a crossing course. Then the *Umbria* appeared, bearing down on her, about 900 feet away. The *Iberia* went full speed ahead in an effort to escape, but failed.

The statement of the case by Justice Brown shows that the lower court had held both ships to blame, the *Umbria* because of her speed, and the *Iberia*,

“first, because after hearing the first whistle of the *Umbria*, she changed her course without knowing the latter’s bearing, course or speed, and second, because she violated Article 18 of the International Regulations by continuing on when she knew, or ought to have known, that the courses of the two

vessels were crossing and thereby involved risk of collision.”

166 U. S. 407.

These were the points which the upper court decided in the cases. It held, first, that there was no fault in the *Iberia's* navigation when she changed her course. She certainly violated no statutory rule and, as an act of seamanship, her action was not condemned. Second, the court, also, found that the *Iberia* had been navigated at a proper speed up to the last moment, when, to avoid collision, she tried to shoot past the *Umbria*.

The majority of the court held that there was no fault of any kind in this act. Hence, there was no violation of any statutory rule. The minority of the court thought that if there was a fault, it did not contribute to the collision.

This decision has been three times interpreted by the Circuit Court of Appeals for the First Circuit to mean that the *Iberia* was *in extremis* and not to blame for anything she did after hearing the *Umbria's* whistle.

*The Schley*, 131 Fed. Rep. 433;

*The Columbian*, 100 Fed. Rep. 991;

*The Gertrude*, 118 Fed. Rep. 130.

It was said in the decision of the court under the circumstances above stated, and as a matter of proper, ordinary navigation, not of statutory rule, that two steamers running on crossing courses in a fog must so regulate their speed that each shall be able to stop before the point of intersection of their courses is reached. If one stops, it seems to follow that such vessel has done

her duty. She has ceased to move, and, so far as the collision is concerned, she is passive and does not contribute to it. But the Court of Appeals in *The St. Louis* entirely overlooked the fact, as we have shown it to be, that *The Umbria* case dealt with seamanlike conduct in navigation, not with a statutory rule.

As *The Umbria* was decided on the "ordinary rules of navigation" it is quite clear that the court in *The St. Louis* erred in applying its provisions, by way of dictum, to a case where they had themselves just admitted must be decided under the statutory rules. The Delaware would have had to show more to escape liability than the mere fact that she had begun to move back before the collision; she would have had to show that *by no possibility* had her failure to obey the rule contributed "in any degree to bring her in a position of danger."

*The Pennsylvania*, *supra*.

## VI.

**The "Selja's" counsel relegislation of rule 16.**

None of the many cases cited, as has been seen, suggests that there is any legal excuse for disobedience of the plain terms of the rule. The necessity of facing this fact compels our opponents to seek a construction of the rule different from that of the cases. This they suggest in an important part of their brief.

They refer to rules 17, 18 and 19, and point to the use in those rules of the words "danger of collision" as indicating that the regulations (including Article 16, which does *not* contain the words) are not intended to become operative until *danger of collision arises*. But, as we have before shown, the International Rules were specially framed with the idea of removing the dangerous inconsistencies of situation found in the old rules, which, as regarded danger of collision, made no distinction in the management of steamships in, or out of, a fog. Rule 16 now refers exclusively to vessels *in a fog*; rules 17, 18, 19, refer exclusively to vessels in sight of each other. In the former, danger of collision is not visible to the eye, *and therein lies the peril*, not in any known condition of surroundings. In the latter, ships are upon an open sea, with all things visible. Now, let us see what counsel ask the court to say. The rule says:

"A steam vessel hearing apparently forward of the beam the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances permit, stop her engines and then navigate with care until danger of collision is over."



It is argued by counsel, and the conclusion is reached, that the words "the position of which is not ascertained" indicate "an uncertainty of position" and that this "uncertainty of position" necessarily is "with reference to danger of collision". Consequently, it is further argued, unless a master can tell, after hearing the first whistle, or some succeeding whistle, that the other ship's position is uncertain with reference to danger of collision, he is not yet called upon to act and there is no need of stopping. However, if he concludes that there is no danger, he is not to blame, by reason of his failure to stop his engines. If he thinks there is danger, he must stop. We, then, find written into the rule by counsel, after "not ascertained", the words "with reference to danger of collision". In order that the new interpretation may be made acceptable, however, it is required that somewhere there be found a criterion by which shall be judged the responsibility which falls upon the master who undertakes to ascertain the position "with reference to danger of collision". Counsel argues that in such matters there must be reason, and this they find in the suggestion which they put forward substantially as follows:

That an approximation of accuracy as to both bearing and distance, showing that danger does not exist is required to be known before the vessel's engines shall be permitted to continue running at moderate speed.

Thus, our opponents would have this court re-enact the rules (we italicise the parts proposed to be legislated):

“Article 16. A steam vessel hearing, apparently forward of the beam, the fog signal of a vessel the position of which, *with reference to the danger of collision*, is not ascertained *by an approximation of accuracy in regard to such danger* shall, so far as the circumstances of the case admit, stop her engines and then navigate with care until danger of collision is over.”

When originally presented to the conference, the rule proposed that the hearing of the fog signal should command the *immediate stopping* of both ships, and would require instant reversing of the *engines* of both. This meant that they should come to a standstill. An American delegate, Captain (afterwards Admiral) Sampson, said:

“I cannot agree with the gallant delegate from France as to the danger of making the rule to stop imperative. On the contrary, I think that if it is optional to stop, when necessary, great danger will arise. \* \* \* It must be evident that if two ships are approaching and in danger of collision, *if it is made an absolute rule that when they hear the fog signals of each other, they shall both stop*, the conditions are the most favorable for avoiding a collision. \* \* \* I think it would not be wise to leave this discretionary *and that it should be made obligatory on both vessels to stop. They thus move from the position at which they heard the signals the shortest possible distance. They make the chances of collision least possible.*”

*1 Int. Mar. Conf., 454.*

Thus, it is seen that the object to be gained was time and space between the ships until navigation should become safe by the knowledge each should get of the position of the other. Counsel's rule leaves nothing of the intention of the original.

In the case at bar, though the distance between the ships was quite large when the "Selja" heard the "Beaver's" whistle, it was not as large as the "Selja's" captain thought. His error led him right up to the collision. The intention of the rule was to prevent such mistakes.

We submit that counsel's interpretation of the rule will not be accepted against the decided cases. Captain Lie, as a matter of fact, did not know that a steamship was ahead of him. He thought the sound was a land signal. Had he been positive it was a ship's signal, his action would have been doubtful, if his evidence is an index of his knowledge of the rule. When testifying before the inspectors he gave his version of the rule as follows:

"As soon as you hear forward of your beam, you have to slow down your engine and, if necessary, stop and navigate carefully until the danger is over." (Apostles, page 286.)

He did not refer to the duty to stop the engines. On his examination in this case, when his attention was called to the matter, he said that part 2 of Article 16 says:

"that if you have located a whistle in a certain place and far away, it is not necessary to stop, and if you have not located it, it is necessary to stop. \* \* \* At that moment, if you have not located it where it is, if it *confuses* you and you don't know where it is, well, then it is necessary to stop". (Apostles, page 187.)

The captain's foggy ideas brought him to grief.

We cannot but feel that our opponents see that the rule condemns them, unless in some way it can be construed as Captain Lie construed it in the extract which we have given. Plainly speaking, the whole endeavor of our friends is to place within the borders of Article 16 of the old rule 18 of 1885. The effort to entirely eliminate the obligation to stop if the signal be safely distant, the effort to make that obligation operative, if at all, only when danger of collision is involved, upon the judgment of the master, and to apply the rule of *The Umbria* as to care in navigation, as a substitute for the stopping required by the rule, and finally to limit the fault to those acts only which are committed at the time of collision—all these things are evidences of counsel's hopes.

They cannot be accepted by the court as a fair interpretation of the rule. Except from counsel and Captain Lie, they find no support whatever. On its face, the court cannot accept the argument that a statute requiring a vessel to stop her engines on hearing a signal from a certain quarter, is relieved from liability for failing to stop, unless that failure occurs at the moment of collision.

It is a final answer to our opponents' attempt to apply the revamped Article 16 to the case at bar, that it would leave to the master the determination of the danger of collision even when, as here, the compass bearing of the "Beaver" remained constantly ahead, in *direct contradiction* of the Congressional enactment declaring that danger of collision shall be "*deemed*" to exist when the compass bearing of the approaching vessel does not appreciably change.



“Risk of collision, can, when circumstances permit, be ascertained by careful watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk shall be deemed to exist.”

*26 Statutes at Large, 326.*

This rule governs even when the vessels are in sight of one another. It is but common sense that it would apply *a fortiori* in the fog where, as here, the ten successive fog signals are admitted by the libel to have been heard from almost dead ahead, before the engines were stopped. And the “Beaver’s” bearing, as indicated by these successive whistles, did not appreciably change, risk of collision *must be deemed* to have existed. The “Selja” is thus shown to be in violation of Article 16 even with the twists of construction our opponent would give it, and her violation arose at least at the third whistle.

## VII.

The rule that, where one vessel has admitted the violation of the rules, the fault of the other must be clearly made out, has no application here as the "Selja's" fault is not only proved beyond a reasonable doubt, but admitted by the libel. The "Selja's" faults are in no sense inconsiderable.

Much was said at the argument about the necessity of full proof of fault in an opposing vessel where a fault such as excessive speed has been admitted by or proved against the other. While we do not admit the existence of the rule as claimed by appellant, but we do not see its application here, where the facts are admitted in so far as rule 16 applies. Let us summarize them.

At 3 p. m. Captain Lie hears the "Beaver's" whistle seemingly dead ahead on a course S. 65 east (libel, page 14). As a matter of fact they were at all times blown from a vessel two points on his port bow. It is absurd to say that the position of the "Beaver" was then located as to *direction* from the "Selja".

After listening for some minutes, the sound "broadens" from dead ahead to somewhere on his port bow (Lie, page 232). This indicates that the "Beaver's" course is from starboard to port across the "Selja's" bow and hence going *away from* her. As a matter of fact the "Beaver" was at all times sailing from a position on the "Selja's" port side *towards* the "Selja". It is absurd to say the "Beaver's" position was ascer-

tained at 3 p. m. as to her *course*. The captain says her course was not ascertained till 3:15 (Lie, page 1172).

Until *ten minutes after* three o'clock, the captain of the "Selja" did not know that the whistle ahead *belonged to a steamer at all*. Let us not forget his testimony in this connection:

"Q. I say, you did not know whether or not the whistle was the whistle of a steamer or the whistle of the foghorn off Golden Gate; that is correct, isn't it?

A. That is correct, I did not know exactly.

Q. Did you know up to 3:05 whether it was a ship four miles away or a foghorn twenty miles away? A. *No I did not.*" (Apostles, page 278.)

Q. You recollect testifying three times do you not, that you did not *know it was a vessel until 3:10?*

A. Yes, I remember." (Lie, page 1172.)

It is absurd to say that a mariner ascertained *anything* from an *approaching* ship when he thinks it a *stationary foghorn*.\*

Finally, the source of the sound was not ascertained as to its distance, for the foghorn in question (Point Bonita) was over twenty miles further off than the "Beaver" was at any time from three o'clock on. It is absurd to say Lie had ascertained the *distance* the "Beaver" was from him when, as he himself says,

"She proved to be nearer than I thought" (p. 280).

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\* Our opponents' brief at page 7 seeks to have the court believe that this was a mere "transitory thought", he having **momentarily** taken the sound for one of the fixed whistles at the entrance of the harbor".

He thinks the "Beaver" is dead ahead when she is not. He thinks the sound has broadened from dead ahead to his port bow, when it has not. He thinks the sound comes from a stationary foghorn, when it does not. He thinks it is twenty-four miles away when it is not a fifth that distance.

Can it be said that the position of a vessel is ascertained when a ship's captain thus *mis*-ascertains a foghorn?

He did not even guess rightly as to the distance as affecting risk of collision for, as he says, "she proved to be much further than I thought".

Can this be called an "*ascertainment*" within the rule of *The Britannia* where the whistle was heard for a longer time than here, or within the rule of *The Schley*, where the vessel was held in fault for not stopping at the "first faint whistle" forward of her beam?

Counsel's praise of the discipline on board of the "Selja" is hardly sustained by the evidence to which we have referred. What the master or his crew may have done after hearing the "Beaver's" whistle at 2:00 p. m. we cannot affirm, but in spite of charts, soundings, whistles and watches, captain, officers and crew, it is very clear that at 3:10 Captain Lie had just become conscious, though minute signals had been blowing ten times, that a steamer was coming upon him, from somewhere within two points of his port bow. Then, instead of reversing his engines (*The Minnesota*, 189 F. R. 76), he simply stopped his engines and allowed his ship to drift (for some of the time at the



same speed) until she came at right angles under the bows of the crossing "Beaver", exposing her 380 feet of length to a blow.

We submit that even allowing the utmost force to the major fault rule, the so-called minor violation of the statutory regulation is made out beyond a reasonable doubt. The "Selja" did not stop at 3 p. m. when she heard forward of her beam the whistle of a steamer, the position of which was not ascertained. Further, she did not do so at 3:01, or 3:02, or 3:03, or on any of the minutes up to 3:10, when she heard the "Beaver's" whistle. She clearly violated rule 16 and as clearly is within the *Britannia* and *Schley* cases.

Therefore no presumption can arise because of our frank admission of the "Beaver's" breach of paragraph 1 of article 16, in favor of the argument that the "Selja's" fault in violating paragraph 2 of the same rule must be deemed venial until *we* prove it to have been directly contributory to the collision. To so hold, would involve the ridiculous position referred to by the Court of Appeals in its first opinion in *The Admiral Schley*, 131 Fed. 437,\* that liability would have to be adjudged according to the order in which the ship's cases are taken by the court.

In that case such a contention was made on the strength of the dictum in *The Umbria*, which vessel was shown, while steaming at 19 or 20 knots outside of New York, to have run into the *Iberia*. It was claimed by the *Umbria* that the latter was also in fault in hav-

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\* The rehearing of this case brought out the decision on rule 16 which we have before cited.

ing tried to cross the Umbria's bows. Judge Putnam says:

"The Mayer relies on *The Umbria*, 166 U. S. 404, in which case she claims it was decided that as the *Umbria* was running under an excessive speed of about 20 knots, the alleged fault on the part of the *Iberia*, with which steamer she collided, could not be taken into account. But the fact is that a majority of the court held the *Iberia* was not in fault, while the other justices were of the opinion that if she had been in fault, the fault did not contribute to the collision. *Therefore, the decision is not effectual here.* We have sufficiently expressed our views of *The Umbria* in *The Columbian*, 100 F. R. 991, and in *The Gertrude*, 118 F. R. 130, where we said that *The Iberia* was *in extremis* from the moment she heard the signals of *The Umbria*. However, it is impossible to concede that there is any analogy between a tug like the *Charles F. Mayer* 'loitering' with her tow, and a steamer like *The Iberia*, which at least *was endeavoring to escape by some action on her own part.*"

*The Admiral Schley*, 131 F. R. 437.

In the case quoted from, it was held that the Admiral Schley

"should be regarded as in fault, which fault, on account of her extreme speed and lack of proper lookout, was grievous. Neither is there any question that her fault contributed to the collision. Indeed, *it was the prime cause*". (p. 434.)

The Mayer, however, was held to be, also, in fault for lack of good seamanship in being, without necessity, in the track of vessels leaving a port, which track was not in the line of her own voyage. The court held that it could not consider the relative intensity of fault in

the vessels, or the defense that one of them had the right to rely on the other not committing an outrageous offense against the rules. The court said, as regards the first of these claims, that

“In ordinary cases, it would operate in reverse directions, according to which vessel’s faults are first considered in ascertaining the causes of the collision.”

And as regards the other, it said:

“The Schley had as much right to assume that the Mayer would not be loitering on the path of navigation and to govern herself accordingly, as the Mayer had to assume that the Schley would not violate the International Rules. \* \* \* the Schley was under no more obligation to assume that the Mayer would violate maritime rules than the Mayer was to assume that the Schley would do the same. If the second proposition were acceded to generally (viz.: that the ship proceeding at a high rate of speed, but for which collision would not have occurred, should be alone liable, notwithstanding fault on the other’s part) there would hardly ever be a division of damages on account of the faults of both vessels.” (p. 439.)

In the case at bar, *the weight of fault was with the “Selja”, rather than with the “Beaver”*.

The “Beaver”, *on a course apparently clear of ships*, because no whistles were heard, proceeded at too great a speed. Within two minutes after gaining knowledge of the presence of the “Selja”, her powerful engines were going full speed astern. This statement covers the whole fault of the “Beaver”.

The "Selja", before hearing the "Beaver's" whistle, was running at too great a speed in a fog (Fault 1).

On hearing the whistle, she deliberately failed to stop as required by rule 16 (Fault 2).

The master failed to consult his crew as to the doubtful sound (Fault 3).

After hearing the whistle, she continued at an immoderate speed for ten minutes (Fault 4).

Knowing, or being required to know, that the whistle forward of the beam might be that of a ship crossing her bows from ahead, she did not take the precaution required by ordinary good seamanship to come down to mere steerage way or to stop, but instead ran rapidly towards the sound (Fault 5).

When she knew that collision from some unknown quarter threatened, and when it was only five minutes away, she did not reverse, but merely stopped her engines which were revolving at the rate of  $3\frac{1}{2}$  to 4 knots. With the force thus given, she ran across the "Beaver's" bows (Fault 6).

The "Selja's" faults *were all committed deliberately*, i. e., with the knowledge that a ship was, or might be, approaching, and that danger threatened. The "Beaver" *had no such knowledge*.

*In re Clyde S. S. Co.*, 134 F. R. 98, illustrates the point we make.

In answer to a citation of the case of *The Umbria*, on the point that her excessive speed minimized the fault of the *Iberia*, the court said:



“Here the faults of the Saginaw are, at least, equal to those of the Hamilton and would seem to be greater in that the Saginaw’s speed was also excessive *and she violated the 16th rule of navigation after the presence of the other vessel was discovered.* The Hamilton in such respect was apparently without fault, as she stopped her engines when the other’s whistles were heard, and reversed, although without much effect in view of her previous speed.”

Captain Lie said in his testimony with regard to the “Beaver’s” position at 3:10:

“I did not locate exactly where she was, but I knew she was a good way off. I could see about two ships’ lengths and my vessel was not moving very much ahead, so I was sure that as soon as she loomed up I could manage to get out of her way *if she was coming at the same navigation, at the same rate of speed.*”

Again, Captain Lie admits a glaring violation of the rule and asserts his readiness to take a chance. He knew of the “Beaver’s” presence, the latter did not know of his. Yet Captain Lie was prepared to assume that the “Beaver” had heard his whistle and that she would slow down as he had done.

The language of the court in *The New York*, 53 F. R. 560, would be applicable here even if it were conceded by us (and we do not concede it) that a breach of paragraph 1 of rule 16 under the actual conditions by the “Beaver” was a greater breach than that of paragraph 2 of the same rule by the “Selja”:

“The great disparity of fault”, says the court, “has invited and received the consideration it merits. But the impossibility of enforcing the great commandment of the law of navigation which *calls*

*a halt* when risk of collision is involved, compels me to adjudge both vessels at fault."

The Supreme Court affirmed the judgment in *The New York*, 175 U. S. 187.

In the case at bar, we admitted the fact that the "Beaver" had proceeded at too great a speed in a fog. Liability necessarily followed. The "Selja" admits that she heard our fog signal from ahead, and that she did not know our position or course, or whether she was hearing a ship's or a land signal, and that she did not stop her engines. This admission is one of a palpable violation of paragraph 2 of the same article that condemns the "Beaver". It is quite clear that the "Selja" cannot *improve* her position at the "Beaver's" cost, by boldly saying: "You admit you were wrong, but I deny that my acts constituted a breach of the rule". The court cannot be asked to adjudge that, because the "Beaver" admits her violation, this admission tends to "show that the 'Selja' did not also violate the rule". The facts, in each case, are admitted. It is only when there is *serious doubt* as to the fault of one, that the presumption works against the other ship which admits or is proved guilty of actual fault. Here, the facts show fault in both. Each broke the same rule. The "Beaver" failed to obey the "shall" of paragraph 1; the "Selja" failed to obey the "shall" of paragraph 2. The "Beaver" was unconscious of impending danger; the "Selja" knew of the danger for fifteen minutes and rushed forward to meet it. Morally, the greater fault by far was with the "Selja".

## VIII.

**It is not necessary for the application of the “but for” or sine qua non rule that the violation of the statute should take place at the moment of collision.**

Counsel place much reliance on the contention that although it may be shown that “but for” the violation of a certain rule when the vessels are maneuvering before one another the accident would not have happened, still if the act of violation does not occur at the moment of the collision the offender is not liable.

It needs but one illustration to show the logical absurdity of appellant’s contention. Suppose two vessels are approaching in broad daylight, head on and a half mile apart. Suppose at this point vessel A blows one blast, and vessel B violates rule 26 by blowing two blasts, a cross signal. Suppose, as is very frequently the case, a collision occurs, say two minutes later, and that there is a flat contradiction in the evidence of the contending parties, as to all other questions of negligence. Would the rule not apply? Would not the court be obliged to say, under all the American authorities, that the burden on the approaching vessel is to show that the collision must have occurred even if she had not violated the rule? And yet the violation was two minutes before.

If libellant’s contention be correct and the violation of the rule must be at the moment of impact, there can never be an application of *The Pennsylvania*, where the violation consists in failing to give passing signals.

*There are no passing signals to be given at the moment of impact.*

An examination of *The Pennsylvania* case, in which the rule is first laid down, clearly shows that the violation of a statutory requirement some time prior to the collision makes the violator liable even though the opposing vessel was grossly in fault. There the fault was the failure to blow a mechanical foghorn, required by the statute, some time prior to the collision. The opposing vessel heard the bell, which was rung in place of the horn, for a considerable period of time, but the court held that as the horn might have been heard even before the bell, the omission of the horn must be held to have contributed. That is to say, the cause which made the vessel liable, was the failure to blow the horn at a considerable distance of time before the collision. The mere tinkling of the bell just at the moment of impact or the blowing of the horn immediately before, could have had no causative relation to the collision.

The words of *The Pennsylvania* "at the time of the collision is in actual violation of the statutory rule" must be interpreted with the later words in the same paragraph:

"The evidence in the present case leaves it uncertain whether if a fog-horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way."

*The Pennsylvania v. Troop*, 22 Law. Ed. 151.



The "time of the collision" is here broadened by the court to include the prior time when the "earlier warning would have been given to the steamer—seasonable warning, etc."

Under our opponents' rule, the "Selja", although in fault, would not have been liable if she had stopped her engines just 200 feet from the side of the "Beaver", and had rammed the latter. That is, she had violated the rule, but had ceased to violate it at the moment of collision, though her headway took her into the side of the "Beaver" instead of broadside on before her.

The want of logic in the suggestion becomes the more apparent when we apply it in other cases. Suppose a steamer had failed to blow any fog signals till both vessels were *in extremis* and then began to blow them. Would it then be held that because they were blown at the time of collision, one must be forced to show that the prior breach of the rule was the proximate cause of the collision—that it would not be sufficient to show merely the prior violation and thus throw the burden on the violator to prove that the violation could not have contributed to the collision?

We submit that the true rule is that laid down in *The Britannia*, *Schley*, *Georgic* and *Pennsylvania* cases, i. e., that if the violation of the regulation initiates forces which subsequently contribute to the collision, and without which the collision would not have occurred, the vessel violating the regulation is liable even though her act is not the *proximate* cause.

## IX.

**The "Selja" violated the first paragraph of rule 16 in that she proceeded in a dense fog at an immoderate rate of speed. Considering all the circumstances, she should have stopped.**

Article 16. "Every vessel shall in a fog, mist, falling snow or heavy rainstorm, go at a moderate rate of speed, having a careful regard to the existing circumstances and conditions" (26 St. 320).

These words which were copied from the Rules of 1885 "deal with the general speed of ships in a fog"; as distinguished from "the special precaution to be observed after the proximity of another vessel has been ascertained by her signals".

*The Umbria*, 166 U. S. 412.

The moderate speed prescribed by the first paragraph is intended, therefore, for ships navigating in a fog which hear no whistles, or, if they do hear them, hear them astern or off on the quarter at distances forbidding thought of collision.

The "Selja" prior to hearing the whistle of the "Beaver" had been and, at the moment of hearing it was admittedly going at the rate of six knots at least. This rate, near the entrance of a harbor and in the course of northbound vessels, was clearly immoderate in itself and grossly immoderate in view of "the existing circumstances and conditions", to which the law enjoins the master to give regard.

*S. S. Martello v. Willey*, 153 U. S. 70.

We have in chapter **IV** set forth what we believe to be the truth regarding the "Selja's" location at the

time of the collision. It was over three miles from the place Captain Lie claims. Instead of moving towards the "Beaver" he had been lying at a standstill for some minutes before the "Beaver" came in sight. We take this story as he would have it, however, in treating this particular violation of the rules.

However inconsistent it may seem, he claims that although he knew "just exactly where he was" when he said he was off Point Reyes "because he worked in on his soundings until he got from one to the other and checked off on his chart" (page 1182), nevertheless, when he heard the "Beaver's" regular whistle he thought it was the Point Bonita fog horn off Golden Gate.\* That is to say, he thought he was very near to the focus of the heavy shipping traffic in and out of San Francisco.

When he first heard the "Beaver's" whistle at 3 p. m., he says:

"It first came into my mind that it might be one of the fog horns off Golden Gate (pages 163-162). It could have been only Point Bonita" which, he admits (page 162) was "over twenty miles away".

Lie, pages 162-163.

He continued on his course, logging six knots, till 3:05, timing the whistle, when he concluded it was time to take precautions. At 3:05, with fog all round him and *possibly fog in his mind*, he says:

"I considered that six knots was not moderate enough *under the circumstances.*"

Lie, page 164.

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\* The chart evidence shows that even then Point Bonita had a siren and not a horn.

After that time, *and for five minutes longer*, still in the belief that he had a land signal, not a steamer's whistle, before him (Lie, page 1170, again page 1186), he kept on, now at a slower speed,  $3\frac{1}{2}$  to 4 knots (Lie, page 1162), until, at 3:10, he knew a steamship was crossing his bows, and that there was danger of collision. Then he stopped his engines and drifted.

“Q. What did you have to attend to?

A. I think it appears that I heard that whistle, that I was timing that whistle, and *clearing up my mind as to that whistle*.

Q. That, you remember, occupied you till 3:10?

A. Yes, sir.

Q. To clear up your mind as to whether it was the whistle *of a ship or not?*

A. Yes, sir.

Q. You did not know until 3:10 whether it was the whistle of a ship or something else; that is correct, is it not?

A. Yes, but I knew then.

Q. At 3:10 sharp it came into your mind that this thing you had been hearing a minute apart was a whistle and not something else.

A. I don't say right on that second, it might have been 30 seconds before, or something like that.”

Lie, pages 1170-1171.

See, also Bjorn, pages 114-115-116 (third officer).

Captain Lie had given no thought, he says, to the fact that the sound (as the libel alleges) was coming nearer and nearer. He would only admit that *he was approaching nearer to the foghorn on land*, not that the sound was also coming to him (Lie, page 281). The sound was on his port bow. He could think of it only as dead ahead.



"I did not think exactly what course the 'Beaver' was steering. I knew at 3:10 it was a vessel. Up to the time the 'Beaver' showed up in the fog, I could not tell what her course was."

"Q. That was 3:15 was it not?"

A. That was 3:15. I did not know exactly what she was heading then. *She may have been heading anywhere at that time.*"

Lie, page 1172.

He had been previously asked:

"Q. Did you think of her course at all as you came ahead during that time?"

A. I commenced to think of the course *after I stopped my vessel*, yes sir."

Lie, page 1171.

Captain Lie admitted that if off Point Reyes he would be in the track of the coastwise vessels (page 220), and hence, in any event, he was going at an excessive speed at six knots.

When he heard the whistle of the "Beaver" we find him in this further dilemma—either he believed he had just passed Point Reyes and was facing an opposing vessel and hence was in still deeper fault in continuing at six knots—or he believed he was right off Golden Gate in the thickest point of traffic on the Pacific Coast, and was in equally deep fault in continuing at this rate.

A six knot rate has been repeatedly held to be excessive.

The following are some of the cases:

*The Martello v. Willey*, 153 U. S. 70, 2 miles north and east of Sandy Hook, off New York, 5½ to 6 miles, held excessive.

*Colorado v. H. P. Bridge*, 91 U. S. 692, in Lake Huron, well away from any port, 5 miles excessive.

*Pennsylvania v. Troop*, 19 Wall. 125, 200 miles from Sandy Hook, seven miles held excessive.

*The Dimock*, 77 Fed. 226, C. C. A., 4½ to 5 knots held excessive while going through the Slue on the Massachusetts coast.

*The Michigan*, 63 Fed. 280 at 287.

*"Five to six miles an hour is a questionable speed in a fog everywhere. The event here demonstrates that it was a reprehensible speed in the waters of Cape Henry, and it was gross fault on the part of the steamer."*

It would seem that under any theory of the case it is established that the "Selja" was not proceeding at a moderate speed, as required by rule 16.

Even in the absence of rule 16, she was at fault under rule 29. This reads as follows:

*"Nothing in these rules shall exonerate any ship or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."*

Good seamanship dictated the duty to stop his vessel on first hearing the doubtful whistle, if doubtful it really was, and to *wait until the character of that*

*whistle was determined.* He could tell that by waiting. If it was a ship, it would approach; if it did not do so, it must be stationary. He preferred to go towards it, though it was straight ahead, or nearly so. Clearly, in the doubtful issue of safety or danger which was presented to him, *he resolved in favor of danger.* He was prepared to take a chance.

A case perfectly analogous with that presented by the conditions testified to by Captain Lie, is that of a ship which is called upon to act when signals become confused.

In *The New York*, the Conemaugh's signals had not been answered, though thrice given. The court said, while in other respects finding no fault:

“The duty of the Conemaugh at this juncture was plain. She should have stopped her engines after the second signal and, *if necessary to bring her to a complete standstill*, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, *or whose positions or movements are uncertain*, she is bound to stop until her course be ascertained *with certainty.*”

*The New York*, 175 U. S. 187, 201.

The rule of the courts is inexorable that, if a steamship takes a chance of danger where the conditions permit of action which involves no danger, she does so at the peril of having to assume all of the consequences of her temerity. It is bad seamanship to do so, and a violation of rule 29.

The “Selja’s” position is, however, far more serious than that presented by the facts of the case quoted from.

Captain Lie knew that, if a ship was before him, he was commanded *by the statute law* of every commercial nation, to stop his engines and determine the position of that ship before again turning them over. He cannot plead his blunder as an excuse for not stopping. It was his duty in any case to stop and find out. *He must, therefore, be charged with the knowledge which he would have obtained if he had stopped, viz.:* that a ship, whose position and course were unascertained, was before him. This being his obligation, his failure to comply with it compels him, if he would avoid responsibility, to prove (as required by the cases already cited) that the collision could by no possibility have been averted, even though he had stopped and ascertained the position of the "Beaver".



## X.

**The "Selja" was guilty of bad seamanship in not reversing at or before 3:10. In this respect, she violated rule 29.**

We ask to be allowed to re-quote from Captain Lie's testimony the answers which bear upon this part of the case.

On direct,

"Q. Why did you stop your engines at 3:10 P. M., November 22d?

A. I only call that good seamanship to do so. I had then *not only located the ship carefully, but I had also ascertained her course* as near as it could be, and I stopped the engines just because it was good seamanship to do so" (Lie, p. 170).

On cross,

"Q. So this was a deep strong whistle blowing intermittently at a space of about one minute apart from 3:00 to 3:10 and up to 3:10 you could not tell whether it was or was not a steamer's whistle or the whistle off Golden Gate; that is correct, isn't it?

A. At 3:10, I knew it, yes.

Q. Up to that time, you did not know it?

A. No, up to that time I did not know exactly, but I made up my mind a little before 3:10 that it was a steamer and I stopped at 3:10 (Lie, p. 302).

Q. Why was it you stopped your engine at 3:10? Didn't you think it was safe to go on with your engines at that time?

A. No, sir, I made up my mind it was a steamer approaching *and I had also ascertained the course of her as near as can be*, and the bearing did not seem to change \* \* \* (Collision was threatening.)

Q. Did you know she was crossing your bow at that time?

A. Well, she must have——

Q. You knew at what time—3:10?

A. Yes.

Q. You knew she was then crossing your bow? Now?

A. I had made up my mind that *she did not broaden* enough on my bow for me to proceed and therefore I stopped the engines” (Lie, 329-330).

On further cross,

“Q. You did not know until 3:10 whether it was the whistle of a ship, or something else; that is correct, is it not?

A. Yes, but I knew then, not right on the second, it might have been 30 seconds before or something like that.

Q. Could you tell what course the “Beaver” was on during that time before you saw her?

A. I could not tell exactly what she was steering, no.

Q. What did you think she was steering about?

A. Oh, I did not think exactly what she was steering. I never thought of the exact course she was steering.

Q. Did you think of her course at all as you came ahead at that time?

A. I commenced to think of the course *after I stopped* my vessel, yes, sir.

Q. I thought you said you did not know whether it was a ship or not. How could you have thought about her course, if you did not know whether it was a ship or not?

A. I said after I stopped my vessel I commenced to think. \* \* \*

Q. Do you recollect testifying that coming out of the fog you could not tell what course the “Beaver” was on until she had shown up in the fog?

A. Yes.

Q. So that up to that time, you did not know what course she was on?

A. Not exactly, no.

Q. That was 3:15, was it not?

A. That was 3:15. I did not know exactly what she was heading then; *she may have been heading anywhere at that time.* (Lie, pp. 1170-1172).

Q. Did you know at 3:13 where her course was going to cross yours?

A. No, I did not.

Q. So that as a matter of fact, you really did not have that vessel located as to where she was in the water at 3:13, is that correct?

A. Her bearing seemed to be the same, but she broadened a little bit. I did not locate exactly where she was, but I knew she was a good way off. I could see a couple of ship's lengths and my vessel was not moving very much ahead" (Lie, 330).

The two ships had been from the begininng, as is admitted, on crossing courses. The "Selja's" course was S. 65° E. magnetic, the "Beaver's" was N. 86° W. Captain Lie, to meet the criticism that must follow the admission that he kept straight ahead under such circumstances, says that the whistle "broadened a little bit", meaning that there was a slight indication that the "Beaver" was turning away from him. This was at 3:13; yet a moment before, at 3:10, he knew that "she did *not* broaden enough on his bow to enable him to proceed, so he stopped" (Lie, 330).

Captain Lie "commenced to think" about the "Beaver's" course *after he had stopped his engines* (Lie, 1171). He says she must have been crossing his bows. He had no idea of her course at 3:13, *three minutes*

*before the collision*, except that “her bearings seemed to be the same” and that “*she was a good way off*” and at 3:15, *one minute before the collision*, so far as he knew, “she may have been heading anywhere at that time”. Yet it had not occurred to him to reverse his engines, though he was in imminent danger, a fact which he should have known. Though in one sentence he says that at 3:10 he had located the ship carefully (Lie, 171), he admits in another that at 3:13 “I did not locate exactly where she was, but I knew she was a good way off” (Lie, 330). He proved to be all wrong.

The preliminary sailing rule of Article 17 says:

“Risk of collision can, *when circumstances permit*, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.”

Apparently, Captain Lie was using this rule as a means of information, but failing to act on the knowledge to be gained by it. The rule is, of course, easily applicable by sailing vessels in sight of one another, or by steamers in sight of lights, but it cannot be relied upon where the compass bearing of an illusive fog signal is taken as indicating a ship's course.

“The steering and sailing rules can be applied with effect only when the *position and course* of the one ship are approximately known to the other. *They are therefore frequently inapplicable in a fog. In that case, each ship must comply with Rule 16.*”

*Marsden on Collisions*, 5th Ed., 384.



Captain Lie had, at no time, the excuse for continuing ahead that the "Beaver's" signals sounded from a direction that indicated she would pass in safety. These signals were from dead ahead, or a little on the port bow. *He would never have steamed toward them if he had not supposed he was going towards a distant land signal whose loud blast, carrying a great distance, he was hearing.* He considered himself quite safe, therefore. As he says, he had not, *as late as 3:10, given a thought* to the "Beaver's" course. At 3:13, "she might have been heading anywhere", for all he knew. At 3:10, he became aware of his blunder and that a steamer was upon him, he knew not from what direction. He had not thought of a steamer. Yet Captain Lie would have the court believe that, in a collected manner, he reasoned that the  $3\frac{1}{2}$  to 4 knot rate which his ship had at 3:10, would run down, before the "Beaver" could get to him, to such extent that he could easily escape her, provided the "Beaver" should in like manner have spent her force at the time the two vessels should sight each other. But, as it happened, the "Beaver" had been prevented by the fog from hearing the "Selja's" signals, consequently, *she had no notice of danger and of the duty to slow or reverse in face of it.*

The case of the *Koning Wilhelm*, 9 Asp. M. Cases, 427, is in point. There the engines of both ships had been "working dead slow". They could see two ship's lengths in the fog, as Lie says he could. "That short distance," said the court, "*indicates the density of the fog*" (p. 427).

*The Bittern*, one of the steamers, was found at fault at once. The case of the *Koning Wilhelm I* was considered. The decision of the court, in its summary, states the law very clearly:

“*The Koning Wilhelm* in my opinion and in that of the Elder Brethren, *distinctly contributed to the collision* in two ways. First by her master not stopping her engines when he ought to have stopped them in that dense fog with so many vessels about.” (p. 428.)

(The court on page 427 found this fault to be one in good seamanship, as well as a breach of Article 16.) It continued:

“*Being in doubt*, as he was on his own admission, he ought to have stopped his engines and when he found shortly after, as he did find, and as he admitted he found, that the other vessel was porting and that her whistle signals were narrowing on his bow, indicating to him a position of extreme danger—the position being that a vessel which could only be seen at about 150 yards was porting across his course—he ought not only to have stopped his engines, *but to have reversed them*. That is not only required by the rules, but is necessary for proper navigation.”

The rule which we are considering is Article 29, which provides:

“Nothing in these rules shall exonerate any vessel, or her owners \* \* \* from the consequences \* \* \* of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.”

26 St. 320, Art. 29,

*Spencer on Collisions*, says:

“It may be stated, as a general rule, that it is necessary for a steamer to stop and reverse in a dense fog when whistle or fog signal is heard approaching on either bow, and apparently in the vicinity, unless the fog signals of the approaching ship unequivocally indicate that it is headed so as to pass clear, without involving risk of collision. Where two steamships are invisible to each other in a dense fog, and find themselves drawing near together, ordinary prudence requires them to stop or reverse, without waiting until they become visible to each other, unless there are attending circumstances of unusual character which make it more dangerous to stop or reverse than to advance. Such danger, however, must not be imaginary or speculative, but must be a positive, present and imminent one. In the absence of such imminent danger as prevents stopping or reversing, it is the duty of steamers approaching on opposite courses to stop until they come to a clear understanding with regard to their respective position and courses; and where there is any confusion of signals or any other apparent risk of collision, it is their duty not only to stop, but to reverse until all way is lost.”

Now, the captain admits that from the hearing of the first whistle, *his ship approached the sound* which turned out to be the “Beaver’s” signal. She approached it rapidly because she was going at six knots, while it was approaching her at the rate of twelve knots. The sound was apparently *dead ahead*, or very slightly on the “Selja’s” bow. Most of the time, if he had stopped his ship’s engine—at any time up to the moment before the “Beaver” loomed up in the fog, if he had reversed his engines—the master of the “Selja” could, certainly have avoided the collision. Though

conscious at 3:10 of the fact of an oncoming ship and of imminent danger from right ahead, he merely stopped his engines and allowed his ship to drift rapidly towards it. The rule laid down by the *Umbria* under the Rules of 1885, is that on hearing two or three whistles ahead, a steamer should stop (166 U. S. 404). The “*Selja*” heard ten whistles before she stopped. In *The Minnesota*, 189 F. R. 706 (Advance Sheet, Nov. 2, 1911) the district judge for the Southern District of New York said (p. 709):

“As soon as she heard the first blast of a steam whistle *directly ahead*, in a dense fog, Article 16 of the International Rules required that she stop her engines and then navigate with caution until danger of collision was over. In my opinion she was not navigating with caution when she simply stopped her engines *and drifted on directly towards the steamer sounding the whistle ahead.* \* \* \* I think she should have reversed as soon as she heard the first blast ahead.”

The conditions and the possibilities of the situation are illustrated in the opinions given in the House of Lords in *The Ceto*, L. R. 14 Ap. Cas. 670.

That case involved the question which we are considering from two points of view, viz.: the application to the facts of the old Article 18 (Rules of 1885) which required a ship approaching another “so as to involve risk of collision to slacken her speed or stop and reverse, if necessary”, and of the rule requiring a master, under all circumstances, to exercise good seamanship.



We submit the following passages taken from the opinion of the judges in the case referred to. They aptly illustrate the conditions in the case at bar and point to what Captain Lie should have done.

Lord Watson said:

“When the approaching vessels are enveloped in fog, and cannot see each other, the rule must, in my opinion apply with greater stringency. Their respective officers are in that case, guided solely by their sense of hearing, which may enable each of them to speculate with more or less accuracy as to the position of the other vessel at the time when its fog whistle is heard. But the direction from which the whistle comes can afford no indication of the course of the approaching vessel unless the sound is repeated, and its bearing is, on each repetition, carefully observed. Even then, the bearing of the vessel and its courses are more or less matters of speculation, and cannot be ascertained with the same certainty as if her hull or lights were in view. When two steamships, invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ships’ lengths, they are, in my opinion, within the second direction of Rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision. In the absence of such indications, it humbly appears to me that to negative the necessity for stopping and reversing when the vessels are near to each other, though still unseen, would be to thwart the very purpose for which the rule was enacted.” \* \* \*

After referring to various decisions, the judge said:

“In the first of these cases, the present Master of the Rolls said: (7) ‘It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or foghorn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity, because there must then be a risk of collision.’ To the proposition so stated I entirely assent. When the approaching vessel is nearly ahead, the duty to stop *and reverse is obvious*; but it appears to me to be equally imperative when the other vessel is drawing near upon either bow. It matters not whether the bearings of the approaching ship be one point or four; either position is fraught with danger of collision if it continues to advance without change of bearing.”

*Lord Hershell* said (p. 695):

“I think that when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of each other.”

*Lord Bramwell* sums up a situation exactly like that under which Captain Lie acted (p. 689):

“He did not know where the other vessel was, nor what she was doing; that he *thought* something, that he *speculated* and that he had acted on his opinion instead of *making sure* by stopping and reversing. There was no reason why he should not; it was a calm and no other vessel was near.”

If the “*Selja*” ought to have reversed and did not do so, she was guilty of a fault in seamanship. Re-

versal would have prevented the collision. Drifting under a stopped engine took her into the "Beaver's" course a fraction of a minute before the "Beaver" reached the point and struck her. Safety lay in reversal, if she had performed that duty. It is to be said that, though the rule of good seamanship was violated by the "Selja" though she was brought into a spot at which some seconds later she was struck, the fact that when struck she was lying still, or was working away from the spot is sufficient evidence that her failure to reverse did not contribute to the accident? *De minimis non curat lex.*

## XI.

**The "Selja" violated Article 15 for a considerable time preceding the appearance of the "Beaver" in not giving the two blast signals indicating that she had no way on her.**

This rule provides as follows:

Article 15 b. A steam vessel under way, but stopped and having no way upon her, shall sound at intervals of not more than two minutes, two prolonged blasts with an interval of about one second between.

All the foregoing assumes that Captain Lie has established his claim that the "Selja" had just come to a standstill from a course of south 65 east (straight for the lightship) at a point about 2½ miles from Point Reyes, when the "Beaver" appeared out of the fog; and hence that the "Selja" was justified in not blowing a two-blast signal prior to this time to indicate that she had no way on her.

A careful analysis of the testimony shows conclusively that the collision occurred about six miles southeasterly from Point Reyes at a point which the "Selja" could not positively have reached in time after the alleged passing of Point Reyes and at the speed sworn to by her captain. That instead of heading S. 54 east—a point (11 degrees) south of her course of S. 65 east—when the vessels sighted one another, as claimed at one place by the "Selja's" captain, the "Selja" was then lying in the trough of the westerly sea, pointing about due south, and at right angles to the course of the "Beaver", and that she had been at a standstill



for some minutes without blowing the necessary two blast signal. That the blowing of the one blast, thus indicating the "Selja" had way on her, led Captain Kidston who heard it twice on his starboard bow, to believe that she might be crossing the "Beaver's" bow, and hence to reverse full speed, thus throwing his bow to starboard as he proceeded under reduced momentum and causing him to collide. Whereas if he had known the "Selja" was at a standstill, as would have been indicated by two blasts, he would have simply sent the "Beaver" over a little to port and cleared the "Selja" by a good distance.

Before undertaking a critical examination of the testimony of all the witnesses, it is well to consider the extraordinary story told by the "Selja's" officers. They say that after some weeks sailing from Japan they knew by distance run and observation that they were somewhere off the California coast; that they entered a fog at one o'clock of the morning of the 22d of November, that is fourteen hours before the collision; that they changed their course five times during that period, as follows: South 70 east till 8 A. M., then due west magnetic till 9:30, then east by north till 11 A. M., then due west again till one o'clock, then south 60 east till 2:50 P. M. (Lie, pages 155-156); sometimes sailing before the sea, then again turning clean around and sailing in an opposite direction, heading into it, sometimes at full speed, sometimes at half speed, and sometimes at very slow speed.

They say that at 2:30 while proceeding at half speed, they heard a *siren*, blowing for  $21\frac{1}{2}$  seconds, at intervals

of *thirty-five* seconds, which they at once recognized as the Point Reyes whistle, on which they took bearings and at 2:50, after examining their chart changed their course to south 65 degrees east "straight" for the lightship off Golden Gate. This change was made before any soundings were brought to the bridge, though there was an attempt to show that the soundings being taken on the poop and then unknown to the bridge, did support the captain's theory as to where he was.

On cross-examination the astounding fact was brought out that the Point Reyes fog signal had been changed without Captain Lie's knowledge, and that the book of directions he had bought at Hong Kong, and on which he was relying, described it as a *steam whistle* with a *five-second* blast, blown at *seventy-second* intervals.

Would it not tax the strongest credulity to believe it? Here a captain has been sailing his vessel fourteen hours at varying speeds in the fog in which she had changed her course five times, in directions sometimes diametrically opposed. He suddenly hears a *siren* of a certain blast and interval, of the existence of which he can have no human knowledge, and thereupon, knows that the siren has been substituted, while on the voyage perhaps, for a *steam whistle* of entirely different blast and interval and that therefore he must be off Point Reyes! And further be so certain that he thereupon sets his course, *before he has brought to him any nearby soundings*, for the lightship, a fixed point seven and a half miles off the Golden Gate, and then some 22 miles distant from the "Selja".

This significant testimony of Captain Lie is as follows:

“MR. McCLANAHAN. Are you speaking of Point Reyes?

MR. DENMAN. Yes, Pt. Reyes.

Capt. LIE. A. Oh, Pt. Reyes — I beg your pardon. I thought you were speaking of Pt. Bonita.

Q. No, Pt. Reyes.

A. *The book I had said that it was a a first-class steam whistle, a five-second blast and 70 seconds interval.*

Q. As a matter of fact, when you got there there was no steam-whistle there? A. No. I found that out.

Q. And what was the blast you heard?

(Objection by Mr. McClanahan.)

A. I found it to be 35 seconds interval, and a blast of about 2 or 2½ seconds.

MR. DENMAN. A whistle or a siren? A. *A siren.*

Q. As I understand it, you changed your course at 2:50?

A. Yes, sir.

Q. That was before the first officer came on the bridge, was it not?

A. Yes, sir.

Q. And you changed your course on the two-whistle bearings from a siren that blew what?

MR. McCLANAHAN. I object to the question as improper cross-examination on rebuttal.

A. 35 seconds interval and 2 or 2½ blast, I don't remember which. But I would like to say——

MR. DENMAN. Just a moment. What direction did you set your course for?

MR. McCLANAHAN. That is objected to as improper cross-examination on rebuttal.

A. I set it toward the light ship.”

Record, pages 1274 and 1275.

“Q. When you heard it abeam at 2:50 did you do anything?

A. Yes, sir.

Q. What did you do?

A. I went into the chart room just soon after that; the chief officer came with the data of the soundings and also with his log of the distance run, and I went into the chart room and put it out."

Record, page 158.

Mr. DENMAN. Q. He had several soundings less than 30?

Capt. LIE. A. Yes, I remember that he said the least sounding he had was 28. I remember that, too.

Q. The least sounding he had was 28. *But before you had received any sounding you had changed your course?*

A. *Oh yes, I had changed my course because then I had had my bearings.* I did not lay them off, but I had my Fort Point bearing as well just to check up so I would see approximately how far I went off.

Record, page 1201.

The "several soundings", if any, brought by the first officer, were those taken at 2:30, 2:35 and 2:40 as the first officer was relieved and the third officer took his place at the sounding machine from 2:45 on. The latter says that every sounding from 2:45 up to the collision was the same, i. e., 35 fathoms (deposition Larsen, page 80), entirely inconsistent with any course of S. 60 east, giving several soundings of under 30 fathoms in the preceding quarter of an hour, as an inspection of the chart will show.\* Six soundings of identical depth

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\* Lie attempted to establish a different theory when pressed on cross-examination, saying the slips had been sent to him by the first officer. As shown by his Ex. 1, the only slips of any importance prior to Larsen's trick at the machine at 2:45, were those of 2:40, 2:35 and 2:30, as before that the soundings were too deep to be of any significance. As the first officer himself brought several, those sent by him from time to time before he came on the bridge must have been prior to 2:30 and of no assistance in locating the vessel.



would seem strong evidence in itself that the vessel was still.

He says that none of Larsen's soundings were reported to him prior to the collision.

Up to the time of changing his course, Lie admits he had but two compass bearings on the siren. Two compass bearings on an unknown siren were sufficient he says to tell him he was off Point Reyes, where he expected a steam whistle, and to tell him with such certainty that the vessel's course could be laid "straight" for the lightship (Dep. Ex. A. log) 22 miles distant.

Captain Lie's counsel claims much for the captain's excellent memory (1208). It should be noted that in this connection that the captain, when he went into the chart room about 2:55, after changing his course, compared his Point Reyes bearing with his Fort Point bearing (see last citation of evidence above). It must therefore have been fresh in his memory that Fort Point was at least 28 miles away in a direction 23 degrees to the east of his course to the lightship. All of this, he says, was completely verified after changing his course by his soundings and his log of distances run, as compared with his two siren bearings, and at 3 P. M., when they had returned to the bridge, by a third siren bearing.

We thus have him claiming to be completely informed as to his location and on a definite course at 3 P. M. He then tells us that he heard a whistle dead ahead (p. 221), that is to say from a direction south of the lightship (p. 221), to which he listened for *ten* minutes uncertain as to whether it was an approach-

ing ship *or foghorns off the Golden Gate*, at all times over 26 miles away, and 23 degrees to the easterly of dead ahead.

His testimony in this connection is as follows:

“Q. Did you know when you heard the first whistle that it was the whistle of a steamer?

A. No, sir, I did not at that time.

Q. What did you think it might have been, if not a steamer?

A. Well, at that time it just came into my mind that it might be one of the fog horns off Golden Gate.”

Page 162.

“Q. You say you had discussed with the other officers, but you did not mention at that time to them the fact it might be this land whistle?

A. I did not mention that to the chief officer. I mentioned it to the third officer when we commenced to time it.

Q. When did you commence timing it?

A. That is at 3:05.”

\* \* \* \* \*

“Q. So you say that you thought at that time that might be a whistle coming from the Golden Gate *dead ahead under the course you were sailing?*

A. *I did not have in mind exactly where the Golden Gate was at that moment.* That just came to my mind because I didn't have the bearings of the Golden Gate in my mind. I was steering the course for the lightship.”

Record, pages 219 and 220, and see *supra*.

The court will here note one of the many extraordinary inconsistencies which the fertile mind of the “Selja's” captain has woven into the testimony. Between 2:55 and 3:00 o'clock he is in the chart room

noting the bearings of Fort Point, the southern post of the Golden Gate itself, to check up his course in the lightship (*supra* and record, page 1201) while between 3:00 o'clock and 3:05 he thinks that a whistle coming from *south* of the lightship may be from the Golden Gate, 23 degrees and seven and a half miles (page 227) *northeasterly*, "because I did not have the bearing of the Golden Gate in my mind". Captain Lie's counsel is certainly correct when he tells us (record page 1208) that the captain's memory is the marvel of those who were compelled to sit throughout the long hearing before the commissioner.

The "Selja" story then is that she continued steaming on in the belief that the whistle might be from shore, from 3:00 o'clock till 3:10, at which latter time she had a speed of between 3 and 4 knots. Her engines were then stopped and it is claimed she went ahead on her own momentum till 3:15, when the "Beaver" appeared. At 3:16 the collision occurred at a point alleged to be about  $2\frac{1}{2}$  miles southeast of Point Reyes.

Such then is the story that the "Selja's" representatives ask the court to accept. It is full of inherent improbabilities. It certainly requires an extraordinary stretch of credulity to believe that Captain Lie thought he heard a siren at the Golden Gate through those 26 miles of dense fog, or that he changed his course to the lightship on two siren bearings which nothing but second sight could have told him were from the recently substituted signal at Point Reyes. We will later examine Captain Lie's testimony at length and show it to be

filled with contradictions manifestly made to serve immediate purpose, as he was pressed in cross-examination.

It will not surprise the court to find that the story of the "Selja" is contradicted by the testimony both of third parties and of the "Beaver's" crew, and by the admissions of the "Selja's" officers and her log. These clearly show:

a. That the "Selja" was lying at a standstill for some time prior to 3:15 and that she had not blown a two blast signal as required by Article 15 of the code.

b. That when first sighted by the "Beaver", instead of heading south 55 east, and hence diagonally across the westerly sea, the "Selja" was lying in the trough of the sea, headed about due south and at right angles to the course of the "Beaver".

c. That the collision took place about six miles southeast of Point Reyes at a point the "Selja" could not possibly have reached, if she had passed Point Reyes abeam at 2:50 p. m.

We will consider successively the evidence establishing these three propositions.

a. *The "Selja" had no way on her for some time prior to sighting the "Beaver" and gave the wrong signal, i. e., one blast instead of two blasts as required by Article 15.*

All the "Beaver's" witnesses agree that no two blast signals were heard from the "Selja" up to the time of the collision, and it is not contested by the representatives of the "Selja" at the trial that none were blown.



Captain Lie says that he lost his log at the sinking of his vessel and that he ordered his officers to prepare a log of the occurrences of the last day. This was done on the day succeeding the collision. It was read over to the officers by the captain and signed by him and the first and second officers (Depositions, Bjorn, p. 123, Anderson, p. 101). In it appears the following statement:

“At 3 o'clock we heard a deep steam whistle ahead quite faint and from then on heard it about every minute; we answered with the same interval. At 3:05 P. M., ordered slow speed, as we heard the whistle nearing, and at 3:10 stopped the engines, the vessel *then* being *nearly at a standstill*.”

Exhibit A to depositions.

This statement that she was “nearly at a standstill” at 3:10 is most significant, made as it was immediately after the disaster and before they had realized their error in failing to blow the two blast signal. If the “Selja” was *nearly* at a standstill at 3:10, five minutes before the “Beaver” came in sight, it is patent that she was actually at a standstill some time before 3:15, and that at least one, if not two, of the two blast signals should have been blown instead of the one blast signals actually given. Indeed Captain Lie admits that at 3:15 one two whistle signal “should have blown” (page 174).

Each officer was asked as to the correctness of the abstracts from the log, and each confirmed them under oath (Dep. 63, 70, 86, 101, 123). As a matter of fact they signed copies twice, once the day after the collision and once a week later (Halverson, page 63).

Captain Lie's explanation of how he came to read over the statement to his officers and sign it himself when, as he later claimed, he knew the vessel had over three and possibly as much as four knots speed, and hence could not have been nearly at a standstill at 3:10, displays his usual want of candor. He says:

“Q. So that either one thing or the other is wrong; if the statement is in here that she was nearly at a standstill,—that is incorrect according to your statement, is it?

A. It depends upon what you mean by nearly at a standstill; *it may be she was as nearly at a standstill as she could be by the vessel being stopped to 3 knots.*

Q. Then if she stopped at 16 knots you would say the same thing, that she was stopped at 16 knots, but nearly at a standstill because she was as slow as she could be, stopping 16 knots? A. I did not say that. That is an extremity.”

Pages 1163-1164.

Under further pressure of cross-examination he abandons any attempt to reconcile the two statements and insists on his later position, saying (page 1164): “She was not at a standstill and did not appear at a standstill”. He admits, however, that she was at a standstill by 3:15 and hence that he should have then blown a two blast signal.

Two days after signing the log, Captain Lie called on United States Inspector Bulger, in response to a request that he testify at the investigation of the conduct of the American officers in charge of the “Beaver”. This was on the morning of the 25th of November. In talking over the collision with Inspector Bulger, Cap-

tain Lie stated *that he had been stopped* for ten minutes before the collision. Inspector Bulger's testimony is as follows:

"Q. Can you tell the conversation, Captain?

A. To the best of my recollection I will tell you just what happened; it is brief.

Q. That is what we want.

A. I spoke to the captain. I cannot tell you the exact words, but when we got to a point where *the captain told me that he had been stopped for ten minutes, I asked the captain if he was blowing his whistle; he said yes, that he was blowing a fog whistle.* At that point I said to the captain 'We don't wish to take any advantage of you, Captain, I think it would be advisable for you to have your attorney here to represent you'. The captain went away and returned in the afternoon with Mr. McClanahan, as his attorney.

\* \* \* \* \*

"Mr. McCLANAHAN. Q. Did he say or did you understand clearly what he meant by the statement that the 'Selja' had been stopped about 10 minutes, Captain? Did you understand that he meant that the 'Selja' was dead in the water or that her engines had simply been stopped?

A. When I get it from the bridge that a ship is stopped I take it that she is stopped through the water. When I get it from the engine room I take it that her engines are stopped. I would think that when the captain said his ship was stopped that her headway was stopped."

Pages 947, 948.

In the afternoon Captain Lie returned with his attorney and changed his statement to a stopping of his *engines* for *five* minutes and a continued way on the ship till the "Beaver" came in sight instead of a stopping of the "*Selja*" herself for *ten* minutes. Mr

Bulger, who was a chief engineer before he became inspector, noticed the discrepancy at once, but waited to check it up with the "Selja's" engineer's testimony and his log.

To his astonishment Captain Lie's attorney refused to allow the chief engineer to be sworn, although he was waiting in the hall to be called. Mr. Bulger's attempt to have him put on the stand came after his asking the preceding witness a question about the time between the alleged stopping of the engines and the collision (page 993) so that Captain Lie's attorney could have no doubt about Mr. Bulger's purpose in calling the engineer. The testimony in this respect is as follows:

"Inspector BULGER. We would like to have your chief engineer.

Mr. McCLANAHAN. I think we have given our statement sufficiently.

Pages 993-994.

Inspector BULGER. Have you any objection to putting anybody else on the stand?

Mr. McCLANAHAN. Yes, simply because it is not necessary to put them on the stand in this hearing.

Inspector BULGER. I would like to know if his engine was stopped, according to the log?

Mr. McCLANAHAN. I prefer not to have any of the witnesses put on for the Norwegian ship.

Inspector BULGER. We got part of it.

Mr. McCLANAHAN. You got all of it. Well, I have said my say, I don't propose to put on any more witnesses. They can give you no more light than you have; I examined them and I know.

Inspector BULGER. According to that we are not competent, but we have been handling these cases



for over twenty years. We think the engineer is essential in this case.

Mr. McCLANAHAN. You have the evidence."

Bulger, page 979.

The question then being investigated was, was the "Selja" at a standstill before 3:15 and hence at fault for not blowing two blasts of her whistle? Captain Bulger wanted to interrogate the "Selja's" engineer on this point. Captain Lie's attorney would not permit it because he said he knew what the engineer's testimony was, and that it would have been the same as the others. As the attorney put it—

"You got all of it. Well, I have had my say. I don't propose to put on any more witnesses. They can give you no more light than you have. I examined them and I know."

Page 979.

The counsel was evidently mistaken as to what his engineer would say, or at any rate, if he had "examined him" he did not "know" what "light" he would throw on the question. It appeared before a week had passed that they had not "got all of it" and that the engineer *could* give "more light" than they had. As a matter of fact, he testified in his deposition taken on December 2nd that the "Selja" must have been at a standstill by at the latest 3:13, two minutes before the "Beaver" hove in sight. The engineer, Eggen's testimony is as follows:

"Mr. DENMAN. Q. And at 3:10 the engine had stopped.

A. Yes.

Q. How long would it take her to stop her speed going at the rate she was going at 3:10? About a minute, isn't it?

A. Oh, it would take perhaps two minutes.

Q. Not more than two minutes?

A. Do you mean to stop herself?

Q. Yes.

A. Oh, a minute to two or three minutes.

Q. About a minute, isn't it really, chief?

A. No, well, it would take her two minutes, I should think.

Q. About two minutes?

A. Yes.

Q. That is at the outside?

A. Two or three minutes.

Q. Not more than three?

A. No.

Q. You are sure of that?

A. Yes."

Deposition Eggen, page 73.

Our opponent's comment on this is interesting. He says, in answer to a question:

"Q. He did testify to that within a week after the hearing, didn't he?

A. On your cross-examination he did, and you put the words into his mouth, yes. A poor foreigner, who didn't have very good command of English, and he was led up to the water and made to drink."

Page 995.

Counsel had for the moment forgotten that Eggen had given similar testimony before the Norwegian consulate (1342).

An examination of Mr. Eggen's deposition absolves him from any accusation of defective English. He really needs no such absolution, as it is proof positive

that the "poor foreigner" had been led into no error which could be remedied, that his able counsel did not attempt to correct his statement on redirect examination. The taking of the depositions was continued till the afternoon, but he was not recalled after the recess had given full opportunity to talk over the matter with him.

Still more significant than the failure to re-examine Eggen is the fact that *not one of the other officers was asked in his deposition as to whether the "Selja" had lost her headway before she began to reverse.* This was the glaring fault of which it had been intimated by Mr. Bulger that she had been guilty—that she had been at a standstill for some minutes and had not blown her two blast signal. Eggen had testified that she must have been and yet every officer, save the captain, was exhaustively examined by the libelant's counsel and not one asked whether she had come to a stop in the water, or any question concerning her headway in the two or three minutes before the "Beaver" came in sight.

Let it not be said, however, that our opponents have no testimony on this subject. They have much. While openly contemptuous of their chief engineer, who had been with the vessel since she was launched, and avoiding the evidence of the deck officers who saw and must have known the facts, libelant's counsel offer three expert ship building engineers, all without experience in navigation. These gentlemen have deduced certain stopping formulae from experiments made *at launchings.* At these launchings all the vessels are checked

and finally stopped within 1000 feet by means of hawsers and the resistance of the cradle on which they rest and which is launched with them (page 1114). Their speed varies in this short distance from over 13 knots an hour to nothing. From this they calculate that it would take the "Selja" 9 minutes and 52 seconds to stop (page 413). There is no difference between these three savants as to the seconds, but they disagree with the "Selja's" own captain as to something over four minutes, Captain Lie insisting that she was *just* stopped at 3:15, or in five minutes. The disagreement with the captain is of course of no significance, as he never has had any opportunity to time vessels as they slide down from their cradles (or with them) at launchings, and are checked in their speed by successive hawsers. It is a splendid demonstration of the accuracy of science that the engineers agree as to the seconds between the ninth and tenth minutes. Surely their formulae deduced from the launching pool must be infallible when applied to loaded vessels moving without check of either hawser or cradle in the open sea!

Before turning from the question of Inspector Bulger's testimony, it is but fair to our opponent to say that he now claims his reason for refusing to permit the engineer to testify was that Mr. Bulger's manner was so discourteous to Captain Lie that he would not allow any other witness to be subjected to it (page 977). Our opponent injected this into the record in response to a question from Mr. Bulger himself.



Mr. BULGER. A. Just let me ask you a question: was there any discourtesy shown to Captain Lie when he was on the stand in my office?

Q. You want me to answer that perfectly frankly, Captain?

A. Yes, I do.

Q. I believe, Captain Bulger, that you were very discourteous to Captain Lie.

A. In what way?

Q. Just wait a moment: you have asked me a question and I am going to answer it. *And that was the reason why I refused to allow any more of the 'Selja's' officers to be examined.'*

Page 977.

Our opponent is, however, again mistaken when he says "he refused to allow any more of the 'Selja's' officers to be examined". He finally remembered under examination the next day, that Captain Lie's examination had been finished and the discourtesy well over, when he did allow the second officer to be examined. He further stated that he could not recollect that any discourtesy had been offered to the second officer, but that the discourtesy to the captain did not fully dawn upon him till the end of the second officer's testimony. It will be noted that it was at the end of the second officer's testimony that the engineer was called for, avowedly to ask him about the stopping of the ship. Our opponent assures us, however, that this had nothing to do with his refusal to let him testify.

The apparent discourtesy to Captain Lie, if it really existed, is easily enough explained. It would have been quite a human thing to expect that Inspector Bulger, remembering Lie's statement in the morning that his

vessel had been stopped for ten minutes, should have pressed him severely when in the afternoon, after consulting counsel, he swore she had not been stopped at all. This is said without any reflection on counsel, as Captain Lie was an exceedingly keen person and would have only to know the law to make certain of his testimony.

Our opponent's proctor did his best to shake Mr. Bulger on cross-examination. On failing to do so he suggested that Mr. Bulger was within the reach of influence because *he was a federal office holder* (page 981). We called on him to explain or retract this statement but he has not done either. We now look to his brief for the one or the other.

Lie denies that this interview or anything like it ever took place (Record, page 1253), so there can be no question of mistake as to the words spoken. It is a square issue of veracity between the United States Inspector and Captain Lie. In such an issue, Lie cannot hope to prevail in view of the contradictions and purposeful shiftings which appear in his evidence on every important point.

In addition to the testimony of Captain Bulger, there are three other witnesses to the admission of Captain Lie that the "Selja" had been still in the water for some minutes before the collision.

The "Selja" was under charter to the Portland and Asiatic Steamship Company and Captain Lie and Mr. Eggen, the engineer, reported to Mr. Frey, the assist-

ant to the president. Mr. Frey kept memoranda of both interviews.

Captain Lie told Mr. Frey that the engines of the "Selja" were stopped at about 3:05, or ten minutes before the collision (page 698). Mr. Frey understood from the interview that the "Selja" had been dead in the water for five or six minutes (page 723).

Mr. Eggen's statement as made to Mr. Frey corroborates his deposition as to the time when the vessel came to a standstill.

"He stated that the engines were stopped prior to the collision for fully five minutes before the full speed astern signal had been given, immediately prior to the collision. That, as the ship had been going under 20 revolutions prior to the engines being stopped, the ship should come to a dead stop in the water under these conditions within one or one and a half minutes, and that he was satisfied the ship had been dead in the water at least three minutes, or slightly more, prior to the time that the astern order was given."

Page 700.

Mr. Frey is at once an officer in the Portland and Asiatic Steamship Company, which is libeling the "Beaver" and of the San Francisco-Portland Steamship Company, which owns her. The latter company has no financial interest in the outcome, as it was 100 per cent insured (page 724).

After the collision, Captain Lie was brought on board the "Beaver" and when he had been given dry clothes, he came up on the bridge and had an interview with her officers. This was just after the vessel

had gotten under way on her return to San Francisco, and within an hour of the collision. The conversation was heard by Captain Kidston, second officer Ettershank and third officer Judson.

Captain Lie then claimed that his vessel had been still in the water for ten minutes. He was excited, as one might expect of a man who had just lost his vessel and had had, in addition, an unwelcome plunge into the North Pacific, on a November afternoon. No doubt his motive was to show that his vessel being dead in the water could not have possibly been at fault—not realizing the error as to the one blast signals. It is quite possible that the ten minutes claimed was an exaggeration born of a desire to make certain that his vessel could have furnished none of the impetus which brought the two together. Captain Kidston described the interview as follows:

“Q. After the collision did you have any conversation with Captain Lie on the bridge of the ‘Beaver’? A. Yes, sir.

Q. Whereabouts did that conversation take place?

A. On the bridge of the ‘Beaver’.

Q. Who was present? A. The second and third officers.

Q. State the conversation, as near as you can recollect it, what you said and what he said.

A. When Captain Lie came upon the bridge, he came up on the starboard side, and I met him at the top of the ladder and, being previously acquainted with the captain, I knew him before, I shook hands with him and expressed my feelings as regards being sorry that the accident occurred. I also inquired if he had any dry clothes and he said yes, although he was shivering; that was



natural, the man had been overboard and was wet and was shivering; I didn't quite believe he had changed all his clothes and I felt his breast to see if he had dry clothes on. While I was doing that he made the remark that he had heard my whistle for 15 minutes and he knew it was either the 'Beaver' or the 'Bear' by the sound of the whistle and——

Q. (Intg.). Did he say why he knew it? A. No, he did it. We met him in Portland and I presume he heard our whistle there. That is the remark he made, that he knew it was either the 'Beaver' or 'Bear' by the sound of the whistle, and *that he had been lying at a standstill for over 10 minutes in the trough of the sea*, and that he had taken a sounding.

Q. Did he tell you what the sounding was?

A. Yes, he said 35 fathoms.

Q. Where did you go with the Captain?

A. After the mate came on the bridge, after the first officer came on the bridge, I took him down to my room to give some heavier clothing.

Q. Did you have any conversation with him after you went below?

A. Oh, yes, we were talking after we went down in my room.

Q. Was there further conversation on the bridge also?

A. Yes, there was further conversation on the bridge, not much though.

Q. What else did you talk about there?

A. He told me on the bridge that he had been up from 2 o'clock in the morning, that he made the land or got his soundings at 2 o'clock in the morning, and he had not got any sleep practically all night, and he had had a fog. That was some of the conversation. That is about all the conversation that I recollect up there. Down in the room he also talked about the collision. I told him he should be thankful for one thing, that his wife and

two babies had been saved and that there was no loss of life to amount to anything.”

Pages 814, 815.

Lie and Kidston were old acquaintances and Kidston tells why he did not then accuse Lie of fault.

“Q. I do not remember that you referred to this fault of Captain Lie’s, when he stated it to you? A. No, sir.

Q. Why not? A. Well, Captain Lie had just lost his ship, Mr. McClanahan, and he was feeling pretty bad and pretty nervous over it; I knew that it was a great fault and I didn’t wish to make him feel any worse than he was, and rub it in on him at all. That is one reason why I did not refer to it.”

Page 835.

“A. The volunteer statement that Captain Lie made at that time did impress me as extraordinary, but I accounted for it in this way: he was very much excited, the man had been overboard, he just lost his ship, and after I had sympathized with him for the loss of his ship, I was sorry that it occurred, it impressed me as though he was trying to tell me that it was not his fault—the collision was not—in other words, I figured that he was trying to impress me that it was my fault, and to do so he told me that *he had been lying dead still in the water for over 10 minutes* and had heard my whistle. That is the impression it gave me at the time.”

Pages 940-941.

Counsel for the libelant has sought to discredit Captain Kidston’s testimony as to this conversation on the ground that he did not incorporate it in his report

to the United States Inspectors nor refer to it at the hearing. His explanation is that he felt that his own conduct was alone in question, that Captain Lie was not on trial, and that it did not seem to him necessary to interject this element into the hearing. That he was wise in his judgment as to the conduct of his case is apparent from the decision of the United States inspectors, for they exonerated him (page 836).

However, Captain Kidston's testimony as to the conversation is fully corroborated by two of the "Beaver's" officers who were on the bridge at the time; third officer Judson, who left the employ of the company in February after the collision (page 479), and second officer Ettershank. Their testimony is substantially the same as Captain Kidston's differing only in their remembrance of the phraseology used by the Norwegian captain. It is as follows:

"MR. DENMAN. What else occurred in that conversation? Give us the whole conversation, just what happened.

MR. JUDSON. A. Well, the captain came on the bridge. Captain Kidston said, 'I see you have dry clothes on'. He said, 'Yes, I have dry clothes on', and the captain told him he was very sorry he sunk his ship. And that is the time that Captain Lie said that he had been at a *standstill there for over 10 minutes* taking soundings.

Q. Did he say what sounding he had taken?

A. 35 fathoms.

Q. 35 fathoms? A. Yes."

Judson, page 476.

"Q. What, if anything, was said in that conversation? MR. ETTERSHANK. A. Well, there was

some words that was said. The captain took hold of him and said 'You have got dry clothes on', and Captain Lie says, 'Yes, I am all right'. Captain Kidston then says, 'Well, I am sorry that I sunk your ship.'

Q. What followed in that conversation, if anything, on Captain Lie's part? A. He said he was laying dead still, he said, taking soundings; he says he knew it was the—he says 'I heard your whistle for somewhere around, about 15 minutes', he says, 'before you hit us'; he says 'I knew it was the "Bear" or the "Beaver" by the whistle'.

Q. Was anything said as to the length of time he had been lying there?

A. He said he had been *stopped there for ten minutes.*"

Ettershank, 510.

The cross-examination of the witnesses seemed to indicate that libelant's counsel found some difficulty in reconciling their statements because they do not report Captain Lie's words *ipsissimis verbis*. They variously attribute to him the statement that the "Selja" for a period of ten minutes before the collision was "dead still" (pages 510, 940), "stopped there" (510) "at a standstill" (476), "lying dead in the water" (libelant's Ex. 29). We respectfully submit that nothing would have been more suspicious than unanimity of statement among these three witnesses who were testifying nearly eight months after the occurrence.

Captain Lie denies that he made this statement on the bridge, and denies that he ever used the word "standstill" as describing a boat which had stopped in the water, and says that he regarded the term as more properly applied to a horse. The word comes easily



to his lips, however, in his answers to questions on pages 253, 1161, 1162, 1163, 1164, 1165, 1166. It is the phrase almost universally used by such admiralty jurists as Justices Brown and Clifford and appears throughout the decisions.

It is most significant also that on the very day that Captain Kidston testified, and before Captain Lie had made his denial, he, Lie, walked with Captain Kidston from the court room and up the street before all the counsel in the case, engaged in a friendly conversation *about the cost of living in San Francisco* (Kidston, 1388, Lie, 1277). Surely if the account Captain Kidston had just given—an account which put Lie entirely in the wrong as to the cause of the collision and convicted him of grave fault—was perjured, he would not meet the perjurer as he came from the stand and walk out of the court room and up the street together engaged in a friendly conversation before all the persons who had been following the testimony.

In considering the evidence establishing this fault, we must bear in mind that it must be proved in the main from the mouths of our adversaries. Their movement, or want of movement, was cloaked by the fog. It is submitted that the evidence of the admissions of the "Selja's" captain, her engineer Eggen, her log, and the actions of her counsel, is convincing. To summarize; the log signed by all the officers shows that the "Selja" was "nearly at a standstill" five minutes before the "Beaver" was seen; the chief engineer says in his deposition she must have been at a standstill

at least by 3:13, two minutes before the "Beaver" appeared. He makes the same statement in his report to Mr. Frey. Captain Lie told United States Inspector Bulger that the "Selja" had been stopped for ten minutes. His statement on the stand before the United States inspector differs from this, and when Mr. Bulger wants to call the chief engineer to determine whether the "Selja" had in fact stopped, Captain Lie's counsel, who had been apprised of the fault in failing to blow the two blast signal, when not under way, refuses to put him on the stand. His assigned reason for not producing Eggen is that he had examined him and knew he would corroborate Captain Lie, but when his deposition is taken a week later, Eggen testified that the vessel must have been dead for at least two, if not three minutes. Captain Lie's counsel at the taking of the deposition fails to ask any other officer whether the vessel was at a standstill before 3:15 or to cross-examine the engineer. Captain Lie tells Captain Kidston when upon the bridge of the "Beaver" just after the collision, in the presence of officers Judson and Etter-shank, who remember the circumstances, that he had been dead still in the water for over ten minutes. He is apparently desirous of proving that his motionless ship could not have contributed to the collision, but he fails to realize his fault in not blowing the two whistles. Besides this, he tells a similar story to Mr. Frey, to whom he reports as the agent of the charterer.

It is submitted either that Captain Lie must be taken to have admitted his fault, or that he has been en-

meshed by a conspiracy so complicated in its ramifications that its iniquity seems beyond belief.

However, we are not compelled to rely on this testimony and admissions alone, for the position of the "Selja" with reference to the swell when the "Beaver" first saw her not only further contradicts Captain Lie's account but lends strong support to the theory that the "Selja" had been at a standstill for some time.

*B. When first sighted by the "Beaver", instead of heading south 55 east, and hence diagonally across the westerly sea, the "Selja" was lying in the trough of the sea, headed about due south and at right angles to the course of the "Beaver".*

In order to properly picture the movements of the two vessels in the fog, it must always be carried in mind that there was a heavy swell from the west, unbroken by wind. Its crest and trough were hence at right angles to its line of movement and lay in a northerly and southerly direction.

The witnesses on both sides (save always Captain Lie and two Danish fishermen procured by him) are agreed as to the intensity of the swell. The first officer of the "Selja" says that one of the boats was smashed alongside the ship (Halvorsen dep., p. 57). It was a "heavy" westerly swell (Larsen dep., p. 78); a "high" westerly swell (Halvorsen, page 1343). The officers of the "Beaver" agree with this, Captain Kidston says, "a heavy swell" (798). Third Officer Judson says "a heavy swell" (478). He had never seen the bar

breaking as it was on their return without a wind (page 478). Second Officer Ettershank says "heavy westerly swell, ground swell running" (page 504).

Three pilots who had been out all the day of the collision till one o'clock, also testify that they remember the day because they had been waiting for the Japanese fleet. Captain Swanson brought in the "Arizona" just before the "Beaver" left the gate. She was a vessel of 12,000 tons capacity, belonging to the American-Hawaiian Steamship Company. Swanson describes the condition as follows:

"MR. DENMAN. Q. What was the condition of the weather that night, Captain? A. The weather was foggy during the night before, it was foggy most of the night, and a very heavy swell; it was an extraordinary swell.

Q. How long did that swell continue?

A. It continued—I came through the north channel at one o'clock that day, and, of course, I could not tell after that. The condition coming through the north channel was as heavy a swell as I ever came through there in.

Q. Was that on the 22nd? A. That was on the 22nd.

Q. What vessel did you bring in? A. The 'Arizona'.

Q. Anything happen to her? A. Well, she carried away her light screens, that is, the screens on the side. All obstructions that were on the side—the accommodation ladder was split all to small pieces, and also it filled all the state-rooms and there was a kind of a general upheaval all around.

Q. Where did this occur? A. Right in the north channel.

Q. What caused this? A. There was an extraordinary heavy break on the bar."



Had there been any mistake in the day testified to by the pilots, the records of the Custom House would have shown it. Had there been any mistake as to the damage done, our opponents would have shown it from the offices of the American-Hawaiian Steamship Company in San Francisco, the home port.

Pilot Von Helms had been going in and out of the port as a master and pilot since 1868. He attempted to take the "Nippon Maru" out over the bar at about 4 o'clock in the afternoon an hour after the collision. He was unable to do so that evening and had to anchor outside the heads off the Cliff House all night.

Pages 1348-1349.

All this is mere human testimony. Its unanimity coming from persons both of opposing interest and indifferent to the cause, is most significant. It is, however, borne out by the record of a mute mechanical device that sets at rest all questions as to the extraordinary conditions on that day.

The United States Coast and Geodetic Survey has maintained for more than 50 years (page 1314) an instrument called a maregraph just inside the Golden Gate in the bay of San Francisco which records the pulsations of the swell coming in from the ocean. The record of the 21st and 22nd of November was so remarkable that it was made a subject of a monograph by Alexander McAdie, chief of the United States Weather Bureau for the Pacific Coast (page 1311; see also 1319). Captain Westdahl of the bureau thought the extraordinary height of the swell on these two days,

as shown by the maregraph record, had been caused by an earthquake and started an extensive investigation through the Geodetic Survey stations (page 1319). It was finally shown to have been a sudden windstorm passing over Central California on November 21, moving westerly and causing a disturbance at sea which sent back the unusually heavy swell of that and the next day.

See full testimony of McAdie, pages 1309 et seq., and Captain Westdahl, pages 1319 to 1333.

A blueprint of the maregraph for these two days was put in evidence (claimant's exhibit, McAdie 1). It shows that the time of the greatest disturbance was between three and five o'clock on the day of the collision. The intensity was equal to that shown by the records of the heavy storm of midwinter (Westdahl, page 1321), thus corroborating pilot Swanson's statement (pages 1286-7).

All this becomes more pertinent in connection with our next chapter on the place of collision. We introduce it here though for two purposes; first as showing the hopeless struggle of Captain Lie, both through his own testimony, and of the two fishermen, to show that there was nothing unusual in the condition of the sea that afternoon, nothing that would in the slightest way affect the speed of a 3000 ton steamer of the type of the "Beaver". The second and main purpose is to show that beyond all question there was a very heavy swell from the west, with no wind to break its crest, which of necessity with its trough would lie north and south.

The next salient point is that the "Beaver" was steaming on her usual bi-weekly trip to Portland, on her invariable course of N. 86 west from Duxbury Reef to Point Reyes. North 86 west is only four degrees (less than half a point) from due west, so that the "Beaver's" regular course took her practically at *right angles to the swell*.

It is unquestioned that the "Beaver" made but one change in her course just after she heard the "Selja's" first whistle and before she began to reverse half a point ( $5\frac{1}{2}$  degrees) to her port, or southerly, thus bringing her but  $11\frac{1}{2}$  degrees south of due west (pages 799, 800), for all intents and purposes at dead right angles to the oncoming swell. She had just steadied after this half point (pages 599, 799) when she heard the "Selja's" second signal blast, and believing she had way on her, began to reverse full speed. This sent her head to starboard as she continued under a rapidly diminishing speed so that she must have been pointing just a shade north of due west and in a perpendicular line to the oncoming swell when she was sighted by the "Selja". Captain Lie admits that he accepts the description of Captain Kidston as to his course as the basis of his chart, the libelant's exhibit 1 (pages 177, 1147, 1206). There is no question raised as to any of these movements save as to the starboard swing of the "Beaver" while reversing, in which Captain Lie, as not infrequently in the record, contradicts himself.

The position of the "Beaver" with reference to the oncoming westerly swell being thus fixed as at right

angles or slightly to the north of it, is a most important factor in the case. While the various witnesses to the collision naturally enough spent no time looking at the compass, they all did watch the opposing vessel. What they say as to the angle of the vessels to each other when they first came in sight and as they approached is then to be considered in the light of a known quantity as to one of them—i. e., that the “Beaver” was at right angles to the oncoming swell.

There are eleven witnesses, aside from Captain Lie, who testified as to the angle at which the two vessels approached *one another*. Six of these are from the “Selja”. *All are agreed that the vessels, when they first saw one another, were at right angles—that is that the “Selja” must necessarily be lying about north and south in the trough of the sea.* Seven of the witnesses say in so many words that she was lying in the trough of the sea when the “Beaver” sighted her.

At the investigation before the Norwegian consul (where we had no right to put questions) the “Selja’s” officers testified as follows:

“Q. Give a statement, if you can, as to how it occurred, and the matters that preceded and followed it. A. I was on deck when I heard three whistles, which called my attention to look around. I thought of some danger somewhere around in the neighborhood; just a little while afterwards, a few seconds, I saw the dark mass of the ‘Beaver’—which proved to be the ‘Beaver’ afterwards—just a little after, a minute or so, the ‘Beaver’ struck us. *She came in the direction something like a right angle on our ship as she was laying there.*



In a minute or so she struck us. It was a dense fog then."

First Officer Halvorsen, page 1343.

"Q. How, or what course, did she appear to be heading, and at what rate of speed did she appear to come? A. I would say that when she struck my vessel, she had about ten knots, and her course was then *at right angles to our ship*, but I did not look at my compass to see what she was heading; you see, she swung some, but I should say she was steering somewhere about west by—oh, I can't say, but I should judge it was crossing our bow somewhere about a point or two points."

Captain Lie, pages 1340-1341.

"Q. Please state how the collision occurred. Were you on deck? A. Yes, sir, I was aft in the poop with the sounding machine.

Q. Will you state how the collision occurred, insofar as you can do so? A. Yes. I had my work, I did not pay any attention to it, but I heard a whistle at 3 o'clock on the port bow, and about quarter past three I saw the steamer on the port side of us.

Q. She was coming toward you? A. Yes, sir.

Q. *At right angles to your course?* A. *Yes, about that.*"

Second Officer Larsen, page 1344.

Engineer Eggen says, at page 27 of the depositions,

"Q. She was coming to your side? A. Yes.

Q. When you first saw her; that is true? A. Yes.

Q. And pretty well around toward the side so that the angle was pretty *nearly a right angle?*

A. *Yes, a little on the foreside, a little forward of amidships.*"

Page 75.

First Assistant Anderson says:

“Mr. DENMAN. Q. You did not stay very long by the ship’s side before you went down below, did you? You were just there for half a second, were you not? A. Just a moment.

Q. Just a moment? A. Just to look over and look into the water and at the same time run down.

Q. You saw the other vessel and you heard your full speed astern signal given, didn’t you, at about the same time?

A. Almost at the same time.

Q. The other vessel was coming on you at *about right angles*, was she not? A. It appeared to me.

Q. At just about right angles? A. Yes, sir.

Q. Then you immediately went below? A. Yes, immediately.”

Page 100.

“Q. You say she went astern about a minute after she struck, a little less than a minute, and about two minutes before?

A. Well, the engine worked altogether about three minutes astern.

Q. About three minutes astern? A. Yes, sir.

Q. That would make it about two minutes before? A. But I could not say exactly.

Q. Well, just about, that proportion? A. About that, yes, sir.”

Pages 102-103.

Bjorn, the second mate, says:

“Q. Now, as I understand it, at 3:15 you saw the ‘Beaver’ coming on you *at about right angles* and you say she seemed to have speed on at that time? A. Yes.

Q. And *she continued* and *finally* struck you at about right angles somewhere about 70 feet aft the bow. A. 70 feet aft the bow?

Q. Yes. A. Yes, something around there.

Q. Somewhere around there? A. Yes, sir."

Page 122.

All the above is from the officers of the "Selja". The following five witnesses from the "Beaver" testified similarly as to the angle between the vessels when they sighted one another. Each says that the "Selja" *was then lying in the trough of the sea*. Lookout Amor, testifies as follows:

"Q. Where was she lying when you first saw her, whereabouts, with reference to the sea?

A. She was laying in the trough of the sea; we was coming head on to it.

Q. And at what angle would that be to your ship? A. Well, she was like that and we come about like that (illustrating).

Q. At right angles to you? A. I don't know whether you would call it right angles.

Q. Was she square on? A. Yes, right square on; her nose was coming towards our bow like that (illustrating).

Q. Would you say she was crossing your bow then? A. That is what she would have done if she had had any way; I guess she did not have any way at all.

Q. Could you tell whether she had any way on at all? A. It didn't look like it. Maybe if she had had any way we would have cleared the ship all right; we was swinging to starboard, we got our helm hard-a-port.

Q. When you hit her what angle did you hit her at? A. Well, she was laying straight across our bow, lying straight across; we struck her right broadside on, you might call it.

Q. Do you mean hit her squarely or at an angle?

A. We hit her square on, sir.

Q. How was the 'Selja' pointing at the time you hit her? A. She was heading offshore, sir.

Q. I mean with reference to the ocean. When you saw her first she was lying in the trough of the sea? A. Yes.

Q. How was she heading when you finally hit her? A. Well, she was hardly in the trough,— I don't know, she looked to me she was kind of slewing.

Q. That is to say, her bow had turned into the sea? A. Her bow was turning to starboard; that is the way she seemed to me to be."

Pages 578-579.

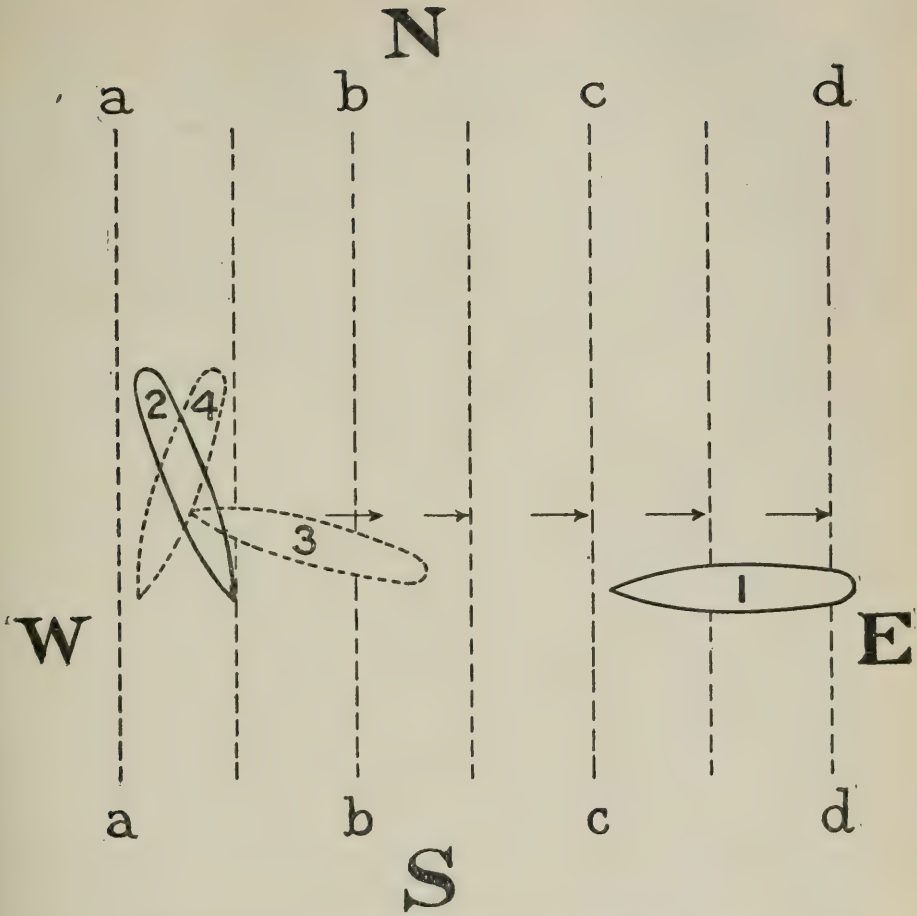
The same testimony is given by the following: Captain Kidston, page 80, Second Officer Ettershank, 508, Quartermaster Hanson, 578, Engineer Paul, page 603, and Wireless Operator Broadus, page 1108.

Both vessels were reversing for about a minute. Both had right handed propellers, and both swung to starboard under the reversing engines (Lie, page 178, Judson, page 477, Kidston, page 801, Amor, page 579, Ettershank, page 508).

The result of the reversing and turning to starboard was that both vessels retained about the same relative position to each other, the "Selja's" bow having turned westerly from the trough and somewhat into the sea at the moment of collision, and the "Beaver" somewhat to the northerly, striking her at right angles (Kidston, pages 802, 826, Seike, page 670, Hanson, page 596, Paul, page 665, 666).

The following chart shows the line of the crest and troughs of the swells and the positions of the two vessels from 3:15 to the time of the collision:





a-a; b-b; c-c; d-d—lines of crests and troughs of seas as they move from west to east.

1. "Beaver" at 3:15, sailing westerly at right angles to line of swell, hears single blast from "Selja", indicating she is under way. Fearing "Selja" is crossing her bow, "Beaver" reverses.

2. "Selja" at 3:15 dead in the water, at right angles to "Beaver" in trough of sea, and pointing southerly.

3. "Beaver" at 3:16, after having swung 3 or 4 points to starboard under port helm and reversing propeller, collides with "Selja" at right angles.

4. "Selja" at 3:16, after having swung to starboard with reversing propeller and turned her head from the trough toward the swell.

All this is absolutely inconsistent with Captain Lie's story that the vessel had way on her from her S. 65 east course just up to 3:15. She must have been dead in the water for a considerable period to have fallen from her course of south 65 east to her position in the trough of the sea, where she was lying at right angles to the "Beaver" and pointing north and south with the line of the trough.

Captain Lie's statements with reference to the position of his ship show the same inconsistencies as his explanation regarding her way. When before the United States Inspectors he said that the "Selja" had swung but a *quarter of a point* (less than 3 degrees) from his course before the "Beaver" *struck* her (pages 305 and 1218). If this be true, then his course must have been about due south for the "Beaver" struck her when her head had just turned westerly from the trough toward the swell. Later Lie says that he had dropped a point (eleven degrees) from S. 65 to S. 54 east, when the vessels *came in sight*. But this would make his angle to the "Beaver" around 32 degrees (Record, pages 176-177), whereas all his officers, as well as the "Beaver's", testify that they were at about right angles when they sighted one another.

When Captain Lie testified at the Norwegian Consulate, three days after the collision, he said that the "Beaver" was crossing his bows (page 1340). Seven months later, when the theory had been developed that he would not be in fault if he were backing away from the other vessel\*, he saw that if the "Beaver"

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\* Following the misleading dictum in the case of the St. Louis, discussed *supra*.

was crossing his bows and the "Selja" was backing there could have been no collision. His testimony then changes to a claim that when first sighted, instead of crossing the "Selja's" bows, the "Beaver" was pointed "somewhere about our midships" (page 1205).

Before the Norwegian consul Captain Lie said that the "Beaver" had swung to some extent from her course while he was watching her up to the time she struck. The record before the consul shows the following:

"Q. How, or what course, did she appear to be heading, and at what rate of speed did she appear to come? A. I would say that when she struck my vessel she had about ten knots, and her course was then at right angles to our ship, but I did not look at my compass to see what she was heading; *you see she swung some*, but I should say she was steering somewhere about west by—oh, I can't say, but I should judge it was crossing our bow somewhere about a point or two points."

Pages 1340-1341; 306-307.

This swinging of the "Beaver" under her reversing propeller throwing her head to starboard and towards the "Selja", necessitates the latter's being still more to the southerly off her S. 65 east course, to account for the vessels striking at right angles (see last diagram). We find Lie at the trial changing his testimony again and insisting that the "Beaver" did not swing, but kept her original course (pages 306, 177).

Lie's proctor made strenuous endeavor to show through his three experts that the "Beaver" would not swing to starboard under the manoeuvres after the

“Selja’s” whistles had been heard. These men are consulting and constructing engineers. None have had any experience in navigation. At first they all testified that the “Beaver” would not swing to starboard. We offered to let them take the vessel and make the experiment (page 1305) and they then discovered that they had left out of consideration one element in the “Beaver’s” movements. It was then found that she would be swinging to starboard and that there was no reason to contradict the statement of Captain Kidston and the “Beaver’s” officers and crew that she would turn a considerable number of points between the order to reverse and the collision (page 1363).

In closing this portion of the argument, we submit that the testimony as to the relative positions of the two vessels when coming in sight of each other and at the moment of impact, shows that the “Selja” was lying in the trough of the sea and completely sustains the testimony that she had been for some minutes prior to the collision without way on her.

*C. That the collision took place about six miles southeast of Point Reyes at a point the “Selja” could not possibly have reached if she had passed Point Reyes abeam at 2:50 P. M.*

Captain Lie’s theory places the collision  $2\frac{1}{2}$  miles south southeast of Point Reyes. He claims to rely on the three bearings from the Point Reyes siren and on his soundings to make this determination. We will show that his soundings are absolutely inconsistent with



his alleged bearings and that his calculations are hopelessly in conflict.

In contradistinction from these guesses in the fog, we have the direct testimony of the "Beaver's" captain and her first and second officers that the collision took place at a point around six miles southeast from Point Reyes light, determined by taking the bearings across his compass after the fog had lifted (Kidston, page 818). Laid on the chart these bearings show the collision to have been a distance of about  $4\frac{3}{4}$  knots to the south end of Point Reyes, and a little over six miles to the lighthouse.

First Officer Seike says he feared the fog might shut down again and, not knowing the amount of injury to his own vessel, that he might have to take to the boats (page 671). He took particular observation of Point Reyes and located the "Beaver" as 6 miles southeast of the point (pages 673, 671). Ettershank, the second officer, confirms this as to general direction and distance, though he did not take bearings (page 511). Amor also saw the land (page 591), as also did Captain Lie, just as he came on board the "Beaver" when Captain Kidston pointed it out to him (page 1266).

This point is just over 18 miles on the courses sailed by the "Beaver" from the red buoy at the north end of the north channel through the bar at San Francisco. The log was set at zero at the red buoy and registered 19.6 knots when taken in at the collision (pages 514, 575, 812). The heavy head swell, in which the log moves with an up and down motion while the vessel cuts through in a much more direct line, causes the log to

travel considerably farther than the vessel. In the language of the sea the log "*overruns*" the ship in going into a head swell. In this heavy swell the first officer tells us the log would have overrun the vessel from three-quarters of a mile to a mile an hour (page 685). In the hour and a half run from the red buoy the log would thus be expected to show a run of about  $19\frac{1}{2}$  miles for the run over a measured distance of 18 miles.

This phenomenon of the overrunning of the log when heading into a swell is confirmed by the testimony of Captain (now Commodore) Lopez of the U. S. Navy, of over thirty years' experience, including details in the Coast and Geodetic Survey and Lighthouse Inspection. He says that it is a well known fact (page 747) and that the reverse is true, i. e., that the log underruns the actual distance when running before the swell, causing the log to "set home" (page 779). The overrun shown by the log in this case did not seem to him excessive (pages 772-773).

Captain Kidston's testimony is similar; every log he had ever had experience with would overrun in a head sea (page 816).

The  $19\frac{1}{2}$  miles shown by the log then confirms the captain's statement that the collision occurred at a place about 6 miles southeast of Point Reyes and something over 18 miles from the red buoy. It is entirely inconsistent with Captain Lie's statement that it occurred at a point  $21\frac{1}{2}$  miles south southeast from Point Reyes and over 22 miles from the red buoy. Under

no possible theory could the log have "underrun" in going into the head swell.

Another fact confirmatory of the testimony of the "Beaver's" officers as to the place of collision, is the number of revolutions made between Duxbury Reef and the place of collision. The testimony is that she was making 77 revolutions (Paul, page 606, Townsend, 1356) which would give her a speed of 15 knots in smooth water. This place would have just brought her to the place of collision claimed by Captain Lie *if there had been no heavy head swell at all to retard her course.*

We have before pointed out the testimony of Captain Westdahl of the Coast and Geodetic Survey, and of Mr. McAdie, of the Weather Bureau, of the Bar Pilots, as to the extraordinary swell prevailing on this day. The maregram showed that it was equal to the severest storms of midwinter (Westdahl, page 1321, McAdie, pages 1310 and 1311).

The action of the head swell has a heavy deterrent effect on the speed of a steamer in three ways: first, in exposing her propeller (racing) and hence diminishing her power; second in the retarding action of the on-coming waves as they strike her; and third, in causing her to pitch (page 1357) and thus travel through the water in a series of long low vertical curves, thus increasing her distance travelled.

The top of the propeller of the "Beaver" as she was laden on this day was just awash (Kidston, 816) and hence every wave would expose it to a certain extent. The huge swells in fact did expose her so that her fre-

quent racing was noticed by both the engineers (Townsend, page 1357, Paul, 605-606).

Captain Westdahl of the Coast and Geodetic Survey, who has been a Master since 1864, and commanded the Gedney, McArthur and Pathfinder, all federal vessels, was asked as to the retarding effect of such a heavy swell as that shown by the maregram on a vessel steaming into it at a 15 knot pace. He says that it would be entirely reasonable to expect that her speed would be cut down 3 knots.

Westdahl, pages 1319-1331.

Commodore Lopez says that the combined effect of a heavy swell in exposing the "Beaver's" wheel and retarding her as she drove into it, would quite likely amount to 3 knots in what would be a 15 knot pace for smooth water.

Lopez, page 745.

Kidston says that from his experience with his vessel he knew she was cut down to at least 12 knots in her last hour's run (page 804). He is confirmed by Mr. Paul, his chief engineer (page 606), and the other officers.

Under these conditions it was absolutely impossible that the "Beaver", which left Duxbury Reef at 2:15, should have travelled 15 miles to Captain Lie's alleged point of the collision in the hour up to the time they came together. On the other hand, with the reduction that the disinterested witnesses and the "Beaver's" officers both expected, the vessel would have travelled to the neighborhood of the point found by Captain Kidston when he took his bearings on Point Reyes.



On the return voyage from the wreck, the "Beaver" took a course for the lightship, fearing to come in by the north channel. She steered south 71 east by her compass, which had a four degree variation to the east-erly, that is to say, south 67 east through the water (Seike, page 672, Kidston, 807, Ettershank, 513). Sailing on this course without an alteration they picked up the lightship dead ahead (page 672). A line drawn S. 67 east through the lightship passes near the place of collision as claimed by the officers of the "Beaver" while it is considerably to the east of the place claimed by Captain Lie (see exhibit 1).

We thus see that every important fact connected with the movements of the "Beaver" sustains the testimony of her captain as to the location of the place of collision, and contradicts the contention of Captain Lie. When we come to examine Captain Lie's testimony as to his movements and calculations, we find it is filled with irreconcilable facts and statements.

The log Lie signed says the collision occurred while sailing on a course S. 65 east "*straight* for the light-ship" (deposition Exhibit 1). On his cross-examina-tion he said this course might take him an eighth or a quarter of a mile south of the lightship (218). He was finally forced to confess that it would take him *a mile and a half to the southerly* of the lightship (81), an absurd course for a man seeking to come into the port of San Francisco from off Point Reyes.

When we come to examine his chart, we venture to say that never before in the history of navigation has

a more remarkable series of coincidences combined to enable a captain to locate, almost to a foot, his position in a fog, off a coast he has just crossed thousands of miles of water to reach.

Just at the hour of 2:30 o'clock, the sound of a siren is heard. Note the time, 2:30, the even half hour, the ideal point for beginning the calculations which are to end at 3:15. Note also that it was not a case of waiting till 2:30 to see what could be heard, but that the first sound came out of the fog to the ship at just this fortunate moment.

The direction of the sound over the compass is *exactly* east by north. Note the nice exactitude of the point of the compass—no puzzling degrees or fractions of a point to complicate our calculations.

The vessel then proceeds through the water at the exact rate of a mile in ten minutes. Here again no fractions—how fortunate!

Just as she has passed over two miles of water the sound comes aboard at exactly right angles to the course of the ship. The time is exactly 2:50, and the compass bearing exactly north 30 degrees east—note, not 23 degrees or 29 degrees, or any other bothersome odd number, but just 30 degrees—an even third between north and east.

He changes his course at 2:50, but even that does not affect the series of coincidences. At exactly 3:00 o'clock he takes his compass bearing. Are we surprised to find that at *exactly three* the sound is *exactly north*

(Dep., page 51). We are not surprised. At *exactly* 3:05 her speed is slowed. At exactly 3:10 her engines are stopped. Always it will be noted the significantly chosen numbers.

But this is not all—not by any means. At exactly two-thirty o'clock, the ship is on a point in the water *exactly* two and a half miles from the Point Reyes siren. Was there ever such perfection of calculation? From Japan to Point Reyes, and just two and a half miles off at exactly two-thirty o'clock.

At exactly 2:50 she is  $1\frac{5}{8}$  miles and at exactly 3:00 she is  $1\frac{7}{8}$  miles. No perplexities as to feet here. It would be wrong to continue at six knots in the fog unless we knew exactly where we were. We continued in the fog, ergo, we *must* have known exactly where we were.

If anyone should suggest that we are exaggerating as to Captain Lie's contention, we refer to the diagram on page 29 of his opening brief. Also to the claim that he is a "*shrewd, alert, well trained navigator*". Also to his testimony that at *three o'clock* he heard the "Beaver's" whistle dead ahead on a south 65 east course, that is *coming in from the open Pacific* and for *ten minutes* thought it was from a lighthouse on the mainland, over twenty-five miles away and in another direction.

It is a harsh and unkind act to suggest that all this fortunate nicety of coincidence, not only does not agree with what Captain Lie told to Supervising Inspector

Bulger and others, but that it is contradicted in every respect by the soundings taken on board his own vessel.

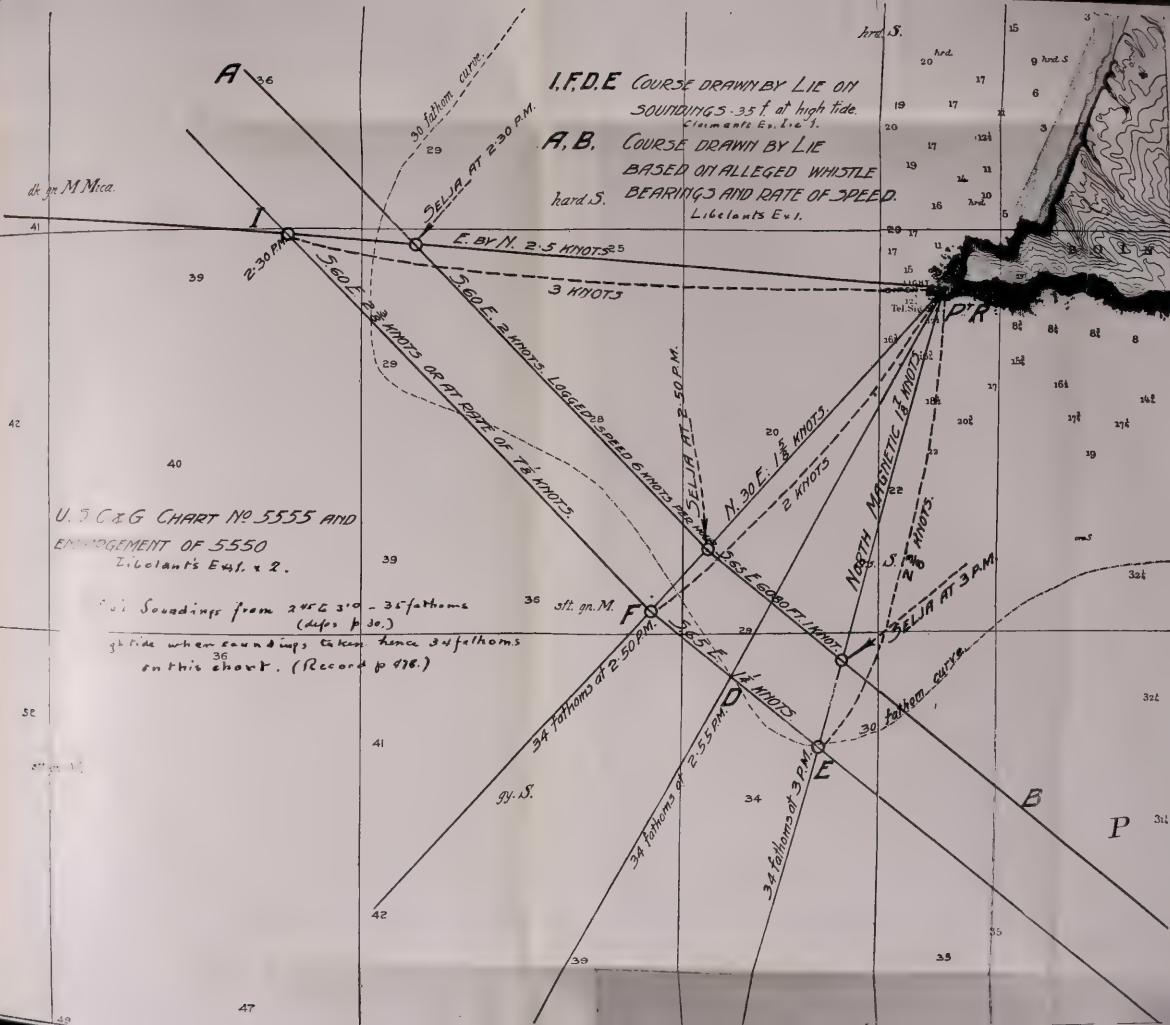
Now, these soundings were taken at even five minute intervals, but there was nothing fortuitous about this. The captain ordered it so. The Norwegian officer who testified to them was not questioned by his own counsel as to their accuracy. His testimony was given in the presence of Captain Lie, who was "conducting the case" (apostles, 243) "four or five feet from the witness" (apostles, page 245). "Shrewd, alert, well trained navigator" that he was, Lie would have had him recalled in the afternoon if there had been any error in the morning's testimony.

*This witness says that from 2:45 to the time of the collision he got always the same depth of water (Deposition Larsen, apostles, page 80). The significance of this statement becomes apparent when we examine the soundings in a radius of five miles of Point Reyes. They vary greatly. In that half hour the "Selja" would have covered even at the six knots claimed nearly three knots of water. The identity of sounding is persuasive evidence that the vessel had been at a standstill for some time before the collision.*

Lie tells us that Larsen's soundings, on account of the tide, would correspond to 34-foot markings on the chart. At the hearing he plotted his course as indicated by the soundings (page 1178).

On the inserted drawing we have copied libelant's Exhibit 1, on the same chart used by Lie in making his exhibit. We have added to the chart the soundings





for the portion of the claimed route of the "Selja" which Lie has drawn on the paper pasted to libelant's Exhibit 1. These added soundings, including the 30-fathom curve line, are taken from libelant's Exhibit 2, a smaller chart. The enlargement is to a scale.

We have also copied the course as finally charted by Lie under cross-examination as based on his soundings, the only fixed and certain data he had. This charting appears on claimant's Exhibit Lie 1. The enlargement here is to scale.

In explanation and comment on our drawing we offer the following:

In charting the three soundings of 34 fathoms, Lie shows his usual anxiety to make out his case, for he places his 34 fathoms right up against the 30 fathom curve line, just as if the bottom of the sea made a sheer drop at that point. However, he drew a line through the three 34 fathom soundings marked F. D. E. on *claimant's* Exhibit Lie 1, which he claims is a "fair" plotting (p. 1182) of the course as shown by them. The course thus shown is inconsistent with that shown by *libelant's* Exhibit 1 in the following respects:

1. It shows that the course prior to 2:50, i.e., S. 60 east, could at most have had but two of the five minute soundings inside the 30 fathom curve line, namely, at 2:35 and 2:40, while the course as claimed on libelant's Exhibit 1, when laid out on the chart with the soundings from 2:30 to 3:05, inclusive, shows eight soundings inside the 30 fathom curve line and hence that none could have been 34 fathoms.

2. It shows that the distance run between "F" and "E", i.e., the ten minutes from 2:50 to 3 o'clock, is  $1\frac{1}{4}$  knots, or at a rate of  $7\frac{1}{2}$  knots an hour (page 1184), instead of the 6080 feet and 6 knot rate shown by libelant's Exhibit 1.

3. It shows the distance run between "I" and "F" 2:30 to 2:50, to be  $2\frac{3}{8}$  knots or at the rate of  $7\frac{1}{8}$  knots an hour (page 1197), while libelant's Exhibit 1 makes it 2 knots at a 6-knot rate.

4. It shows the distance from Point Reyes at 2:30 as 3 knots, while libelant's exhibit shows it as  $2\frac{1}{2}$  knots.

5. At 2:50 the distance from Point Reyes is 2 knots, instead of  $1\frac{5}{8}$  knots?

6. At 3 o'clock the distance is  $2\frac{1}{3}$  knots instead of  $1\frac{7}{8}$  knots (page 1206).

Lie was finally forced to admit that *libelant's Exhibit 1* was based on a mere *two* siren bearings in the fog and the distance covered between them, as shown by the log record in that heavy following swell running across his course (page 1212). He allowed nothing for the following swell or for the "coming home" and "underrunning" of the log, or the yawing of the vessel as she crossed the seas at an angle, elements which Commodore Lopez, Captain Westdahl and the other witnesses tell us vitally affect the distance actually covered as distinguished from that shown by the log.

Lie admits that in preparing libelant's Exhibit No. 1 he did not check it up with the soundings at all. That is to say he ignored the only absolutely fixed data at his command and relied on the double uncertainty of the meager two-whistle bearings and the return of the log.

He admits that *when he changed his course* at 2:50 he had neither the soundings nor the distances run. That is to say, nothing but the two-whistle bearings on a siren entirely different from what he was looking for.

He apparently ignored his soundings on all occasions save at 2:55 on his ship when he alleges he determined his position on his chart, after he changed his course. Speaking of this he told the inspectors that he knew “*just exactly where he was*”, “because he worked in on those soundings until he got from one to the other and checked off on his chart” (page 1182).

We again put the question: If his soundings at 2:55 on his ship showed “*exactly where he was*” why, after he came on shore, did he not plot a chart based on those soundings and not offer one to the court on which none of the claimed soundings are shown? We submit that the answer is obvious. He did not know where he was within twenty miles. He even thought he might be off the Golden Gate. As a matter of fact he was six miles southeasterly from Point Reyes, just where the “Beaver’s” officers say he was, stopped in the water waiting for the fog to rise so he could determine his bearings.

Whether he had been stopped for ten minutes, as he told Mr. Bulger, Captain Lie, Mr. Frey, and the ship’s officers, or for a longer or shorter period, is immaterial. He should have blown two long blasts of his whistle as provided by rule 16 and his failure to do so led Captain Kidston to believe that the “Selja” still had way on, and to adopt a manoeuver which sent him directly into the “Selja” instead of starboarding his helm and clearing her bows as he would have done if he had known she had stopped.



## XII.

**The point of collision could not have been where Lie locates it, two and a half knots southeasterly from Point Reyes. His whole diagrammatic scheme falls with his mislocation of this point.**

In comparing the testimony of Captain Lie with the "Beaver's" witness, it must always be carried in mind that the "Beaver" was sailing on known courses and over familiar waters. Her courses were those regularly followed, from the red buoy south 83 west till off Duxbury Point, thence north 86 west, on which she continued till the vessels were *in extremis*.

The testimony is unanimous that the "Beaver's" speed under favorable conditions—that is, without wind, and with a smooth sea, or a beam swell, which would not expose her propeller—was fifteen knots at seventy-seven revolutions. It is also undisputed that the "Beaver" ran at seventy-seven revolutions from the Golden Gate to the time of the collision. The change to seventy-six revolutions at 3:10 is negligible.

The swell in the north channel, i. e., from North Heads to the red buoy, a distance of two miles, was a beam swell (795, 667). As it came on the "Beaver's" side, her whole length was lifted and fell with it and hence her propeller was not exposed or her progress impeded (795). She covered these two knots in eight minutes, or at her fifteen-knot gait. The fog was then light.

This swell across the north channel is caused by the westerly waves striking the four fathom bank which

diverts them straight across to the mainland. It was undoubtedly this beam swell which rolled the Arizonan so that the pilot on the bridge was wet, and she sustained the damage testified to (1285, 1287). The vessel was probably a little too near the breaking four fathom bank. It is not contended that when that vessel was upright a thirty-five foot wave reached her bridge. What happened was, that when she had rolled over toward the swell, a breaking sea from the bank came aboard over her side. Her speed ahead, however, would not be affected in any appreciable degree by mere rolling.

The "Beaver" left red buoy No. 2 at 1:45 (533), and the collision occurred at 3:16, an hour and thirty-one minutes later.

Here comes another of Captain Lie's extraordinary coincidences. He locates the point of collision at exactly twenty-two and a half miles from the red buoy on the courses which the "Beaver" sailed, a distance which she would just cover in an hour and a half at a fifteen-knot gait, in *smooth water*. Captain Kidston's statement which he gave before the inspectors the week before Lie made up his chart, makes the time as an hour and thirty-one minutes. It also appeared before the inspectors that the "Beaver's" engines were turning seventy-seven revolutions.

We now see why Lie found the two Danish fishermen who testified that the sea was smooth on that day—so smooth that there was not a break on the four fathom bank where a five foot wave would cause breaking water (Dickie, p. 1116). He had by that time discovered (the trial had then continued several weeks) that his various

calculations did not fit *if the swell was admittedly a heavy one.*

As we have suggested, we showed that the fishermen, if honest, must have recalled the wrong day. The maregram, the testimony of Captain Westdahl of the U. S. Hydrographic office, Mr. McAdie, Weather Chief, the four pilots, the Merchants Exchange observer, are all agreed that it was a very heavy swell, comparable with the worst storms in midwinter. *The swell could not have been less than fifteen feet to answer these descriptions.*

It takes a five foot swell at least to shut out of view the ordinary small launch on San Francisco Bay, and this is a frequent sight even on those confined waters.

There is no contradiction to the testimony that the "Beaver's" speed was cut down to the neighborhood of twelve knots on that day. This is borne out in a curious way by the testimony of our opponents' expert Dickie. Dickie tells us (at page 1116) that a five to six foot wave would cut down the speed of the vessel seven-eighths of a knot an hour. Dickie, with the two other construction experts, had been giving testimony on the effect of the swell on the "Beaver's" speed. Their data as to conditions on that day, they apparently received from Lie (record, pages 213, 214), and from Mr. McClanahan (page 367).

Now, taking the theory of *our opponents' witness on his own data*, the speed of the "Beaver" was retarded at the rate of seven-eighths of a knot for over an hour and a half and she must have lost at least a knot and a

quarter after leaving the red buoy. That is to say, she could have run only twenty-one and a quarter knots. *On their own figures* we thus see the point of collision could not have been where the "alert and shrewd" Lie places it, but a knot and a quarter further towards the mysterious land foghorn he heard coming from out the Pacific.

The log records the "Beaver's" run from the red buoy to the place of collision as 19.6 knots. As the sea was a head sea the vessel's actual run could not have been more than that. As a matter of fact the intense violence of the swell may well have made the log overrun over a knot in that time, bringing her actual run from the red buoy down to less than eighteen and a half knots and *four* knots from Lie's location of the place of collision. This would make it just about the six miles approximate distance from Point Reyes Lighthouse and four miles from the south end of the point at which Captain Kidston's compass bearings *after the fog had lifted* would place her.

Our opponent endeavors to cast some doubt on the accuracy of the distance as shown by the log, because the captain, who heard the whistle for setting the log at zero at the red buoy, admitted he did not *see* it set. The witness Ettershank stated unequivocally that it *was* set at zero at 1:45 (page 514), and his testimony was not questioned on cross-examination.

Our opponent also, with reckless disregard of his experts' testimony, tells us that our speed was in *any*



event fifteen knots through the water, even if it was not over the ground—as if there were some distinction where there is no appreciable current. When the swell, by exposing our wheel, wasted our energy on the air instead of expending it in the water, our speed was absolutely cut down for every purpose, whether covering water or crossing land.

Let us then summarize the evidence in this case inconsistent with the shrewd Lie's diagrammatical placing of the point of collision.

1. His diagram is flatly contradicted by the "Selja's" soundings.

2. It makes no allowance for the difference between distance *logged* and distance *run* by the "Selja", due to her "yawing" on a course diagonal to the swells (Lopez, page 747).

3. It allows nothing for the underrunning of the "Selja's" log in a following sea (Lopez, page 747).

4. Its location presupposes a miraculous combination of fortuitous events in the movements of the "Selja" in the three-quarters of an hour preceding the collision.

5. It is a knot and a quarter distant from the point which the "Beaver" would have reached, under the estimated retardation of libelants' own witnesses, Dickie et al.

6. It is three miles from the point as shown by the "Beaver's" log without deductions for overrunning in a head swell.

7. It is over four miles from the point determined by Kidston's actual compass bearings after the fog had lifted—and as estimated by the "Beaver's" officers and lookout.

8. It presupposes that the "Beaver", sailing at her usual seventy-seven revolutions, was proceeding in a *smooth sea*, whereas the "Selja's" own officers, the maregrams, Captain Westdahl, Mr. McAdie, the four pilots, the Merchants Exchange observer, and the "Beaver's" officers, all agree that it was a very heavy swell and the unprejudiced witnesses, i. e., the United States officers and the pilots, agree that it was a swell equal to the worst storms of midwinter.

9. And finally, because the speed of the "Selja", i. e., six knots under forty revolutions, is presumed to have been *entirely unaffected* by this tremendously heavy swell which our opponents' experts tell us exercises a far greater effect on the slow merchantman than on the faster vessels of finer lines.\*

"Mr. DICKIE. If the swell was not large it would not affect the speed.

Q. Suppose the swell were very large?

A. Then it would affect the speed.

Q. And affect the speed considerably, would it not?

A. In a very fast ship not so much, *in a slow ship a great deal*" (page 1049).

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\* In this connection it is well to note that Lie as usual contradicted himself. When before the U. S. Inspectors he swore that the following sea gave Lie headway after the engines were stopped. His testimony then was, "The sea was astern and she had headway" (p. 1210.) He said to the mate "She is going a little ahead because there was a heavy swell from astern" (pp. 1211, 1212.) When it became necessary to sustain the diagram his testimony changed to the following: "Q. Don't you think it is just possible captain that the following sea helped you some? A. Absolutely not" (p. 1189.)

It is submitted that everything (save his absurd diagram) indicates that Captain Lie is in error when he places the point of collision at two and a half miles from Point Reyes lighthouse, and that the preponderance of the evidence supports Captain Kidston's testimony that it was somewhere around six miles southeasterly from the lighthouse.

## XIII.

**Consideration of the testimony of the construction experts. The testimony of these gentlemen is of no value for sea conditions.**

For instance, at pages 384, 385, the expert Heynemann is asked the distance traveled by the "Beaver" after she left the heads. The question presupposes that she had the same sea conditions the whole way, whereas her first two miles in the north channel were with a beam sea which did not impede her at all, while all the rest of the way she was checked by a head sea which kept her propeller out of water. The fifteen knot rate she made in the beam sea is no criterion of her speed the rest of the way.

The next question (on page 387) has the same error. Its answer is irrelevant to the case. So also the next (page 388) presupposes the "same conditions" for the whole way.

The next question (on page 388) presupposes that the "Beaver" has run 23.25 knots over the same conditions. The evidence shows the conditions were not the same at sea as in the channel and that as a matter of fact she did not run 23.25 knots or over 18.5 knots.

The question on page 389 presupposes the "Beaver" was making eighty-four revolutions. She did not, as a matter of fact, make over seventy-seven. The same error exists in the next question.

The next question presupposes that the speed of the "Beaver" at seventy-seven revolutions is 13.572 knots,



and so also does the next. The fact is that her speed at seventy-seven revolutions is 15 knots in smooth water.

The next several questions are immaterial. We do not claim that Kidston set his speed at seventy-six revolutions to reduce his speed, but to make certain his rate. We admit we had some headway on when we struck the "Selja"—how much is immaterial.

The fourth question, on page 390, concerns the movement of the "Beaver" under a reversing propeller, while she was still making headway. Mr. Heynemann declines to answer, as he says it involves a knowledge of navigation, but the other experts, the two Messrs. Dickie, said the "Beaver" would not swing to her starboard.

Later, however, it was shown that the question did not truly state the conditions, and (after we offered to turn the "Beaver" over to them, page 1305) it was admitted she would be turning to starboard under the conditions as they actually were (1363).

The questions on page 391 are based on the theory that the "Beaver" had her speed cut down to 11 knots. As a matter of fact she did not go below twelve at any time.

We do not question the slight difference between the speed and distance covered at seventy-seven revolutions and seventy-six revolutions, as shown by the questions and answers on page 392.

We are agreed with the statements at the bottom of page 392 and top of page 393. The "Beaver" would not make over 16.55 knots with 4448 indicated horse

power. And we agree with our opponent in placing her speed at seventy-seven revolutions at 15 knots in a calm sea.

Now as to the "Selja". There is no relevance to the testimony (page 394), that the "Selja" going at six knots would have stopped in a certain number of seconds if she was reversed full speed, or that she would travel a certain number of feet. She did not reverse until she had been at a standstill for some minutes. The same is true for the testimony on page 395, as to what she would have done if reversed while running three knots.

The next answers are very interesting (page 396). They are that at forty revolutions the "Selja" would have a slip of but 6.46 per cent when making six knots. *This is just about the normal slip for such a vessel in smooth water.*

We are then confronted by this astonishing condition of affairs. A smooth sea at *Point Reyes* and the maregram and the five disinterested witnesses showing undisputably a swell at the *Golden Gate* equal to the heaviest storm in midwinter, and which the maregram also shows has been there for hours before. Now this was a westerly swell, it must have passed *Point Reyes* to reach the *Golden Gate*, and yet it did not have the slightest effect on the "Selja's" speed!

We know that it cut the "Beaver's" speed down about twenty per cent, i. e., 3 knots from a 15-knot gait. The experts (our opponents) tell us that it would cut down a slow vessel a much greater percentage (1049). The sea must have had some miraculous calm

at that point, to be in harmony with the extraordinary coincidences from which Captain Lie made up his diagram as to his location in the fog.

Mr. Heynemann next tells us (413) that the reason the scratches on the "Beaver's" bow would seem to indicate that she entered the "Selja" at an angle of 59 degrees when she struck her at somewhere between seventy and ninety, was because the scratches were caused by the stern motion of the "Selja" as she moved at right angles across the "Beaver's" bow (423). We are entirely agreed as to this. The "Selja" was at a standstill at right angles to us, lying in the trough of the sea. She had been reversing for a minute before we struck her and continued for over a minute afterwards. Naturally she pulled the "Beaver's" bow around and made scratches farther back on the port than on the starboard side.

The significant thing about all this, however, is that it completely destroys the "Selja's" attempted excuse that she was backing away from us. At the end of a minute she had moved but one hundred feet less than a third of her length, *across* our bow, and was exposing her whole broadside to the regular route of vessels along the coast.

We next come to the testimony as to the time it would take the "Selja" to stop. These answers are based on formulae made up from the launching pool and have no relation to the movements of a vessel in the open sea in such a swell as existed on that day.

To show how absurdly theoretical the experts' work was, Mr. Heynemann tells us that in the course of stop-

ping, the "Selja" ran but *seven feet in one minute and forty seconds* (1009).

One slap of that huge swell would send her fifty feet one way or the other, and yet we are asked to calculate her stopping on a formula which takes into consideration a motion of seven feet in a hundred seconds.

It would seem that nothing more need be said of the experts, save to regret that we were unable to offer to let them check their theories as the "Selja's" movements, in the same way as we did with the "Beaver".

### **In conclusion we submit:**

That if the "Selja's" story is true:

Judge Bean's decision must be sustained as she is shown to have violated rule 16, the results of which violation continued till the vessels were *in extremis* and hence was liable; also that the "Selja" violated the excessive speed rule and the prudential reversing rule;

And we further submit that if the court stated the real facts, she was lying dead in the water, while blowing a *one* whistle signal, thus deceiving the "Beaver" into believing that she was moving across his bows, whereas if the truth had been known the "Beaver" could have passed ahead of the "Selja" in safety.

Respectfully submitted,

WILLIAM DENMAN,

IRA A. CAMPBELL,

*Proctors for Appellee.*

MCCUTCHEEN, OLNEY & WILLARD,

DENMAN AND ARNOLD,

*Of Counsel.*





No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Claimant of the American Steamship "Beaver",

*Appellee.*

## REPLY BRIEF FOR APPELLANT.

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*

Filed this..... day of March, 1914.

FRANK D. MONCKTON, Clerk.

By..... Deputy Clerk.

FILED



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*Appellee.*

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## REPLY BRIEF FOR APPELLANT.

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Appellee's brief in this case naturally divides itself into four main parts: (1) that the "Selja" violated Rule 16 and that such violation contributed to the collision; (2) that the "Selja" also violated the moderate speed rule; (3) that she was further in fault under Rule 29 in failing to reverse her engines; and (4) that she violated Rule 15 in that she was for a long time at a standstill in the water and failed to apprise the



“Beaver” of this fact by blowing two whistles. The first point is handled with great ability and, although we feel that the same is met by the argument in our main brief, we shall endeavor to further answer the points made. The second and third points are obviously untenable and can be disposed of very briefly. In the treatment of the last point an effort is apparently made to discredit the libelant and his witnesses on matters which are largely immaterial.

Before taking up these points, however, we would call attention to counsel’s statement on page 2 of the brief, to the effect that the “Beaver’s” violation of the moderate speed rule had a good reason behind it, to wit: “*the safety of her passengers*”. This is one of the most remarkable contentions we have ever heard made, and we would ask the court to compare it with the statement in *The Columbian*: “Indeed, considering the known frequenting of the locality, her speed was without due regard for human life”, and with counsel’s statement (on page 78 of his brief) that the “Selja” was “near the entrance of a harbor and in the course of northbound vessels”. To say that the safety of passengers is conserved by running at full speed in a fog is to say the impossible. We also note that counsel fails to even refer to the *other* faults which we charge against the “Beaver”, and we again submit that the “Beaver’s” gross faults, both admitted and proven, clearly account for this collision. All doubts as to the “Selja’s” alleged faults should, therefore, be resolved in her favor.

## I.

## The Alleged Violation by the "Selja" of Rule 16 and Its Contribution to the Collision.

Counsel intimates in his opening statement that the sustaining of Judge Bean's decision on this point will obviate the necessity of examining 1480 odd pages of the four volume record in this case, a suggestion which we think had better have been left unmade, especially when we consider the many citations of testimony on this point alone. We presume that the court will read the record in any event.

Without following in their order the various contentions which are made we will first consider the English cases cited. And let it here be again remarked that *none* of these cases are on their facts inconsistent with the position we take as to contribution to a collision, for, in each case, the vessels were moving ahead when the collision occurred. Even in the case of *The Britannia* this was true. Admitting for the purposes of argument that these cases are against our *construction* of the rule, their facts are such as to distinguish them on the question of *contribution*. Admitting further, however, that this argument is a specious one, the English law as to contribution is, as we have clearly shown, due to a statutory enactment creating a statutory presumption of fault, and *before* that statute was passed there was admittedly no such presumption in England (see our main brief, pp. 74-77). And because of this statute the court in *The Britannia* case said that it was not "free to consider mere contribution to the collision". The reasons why this statutory presumption did not apply in

England, where a vessel's fault could not by any possibility have contributed to the collision, are clearly stated in our main brief (pp. 77-79). Under the statute the courts were prohibited from dealing with the question whether there was *in fact* any contribution, for the presumption was conclusive on this point, but they obviously could not, even under such a statute, hold liable a ship which could not by any possibility have contributed. Justice and reason called a halt at that extremity.

Counsel, with some show of reason, contends that the International Rules are rules for all maritime nations and should be *construed* alike, but this does not mean that, to effectuate this result, the United States should *judicially legislate* into force the special statutory law of Great Britain. It rather means that we should, if possible, apply the law as it existed in Great Britain *before the special statute was enacted*, and that law was the well known maxim: *Causa Proxima Non Remota Spectatur*.

But we may go even further than this. The British Parliament in 1911 enacted the law known as the Maritime Conventions Act, providing not only for a division of loss in proportion to the faults of the colliding vessels, but also expressly *repealing* the law as to statutory presumptions of fault (1 and 2 Geo. 5 C. 57 Subsection 4). On page 10 of a pamphlet on this subject, Messrs. Roscoe & Robertson, editors of the sixth edition of *Marsden on Collisions*, say:

“The Act repeals the law, hitherto in force, that a ship in the navigation of which one of the Collision Regulations has been infringed, shall be

deemed to be in fault for a collision, 'unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary'. The effect of the removal of this provision will be that a ship will only be held to be in fault for a breach of the Collision Regulations if, in the opinion of the Court, such breach *did in fact* contribute to the collision, even although the circumstances did not make departure from the regulation in question necessary. It follows that any inquiry as to whether a breach of a regulation *might possibly* have contributed to a collision will be henceforth irrelevant, and the law will now be unquestionably clearer." (Italics those of the author.)

England, therefore, now has no statute on the subject and, therefore, *does not* apply the "but for" or "sine qua non" rule. America also has no such statute and hence the rule should be similar here. Counsel says:

"Unless rule 16 is mandatory and unless the punishment of the violation is made certain beyond the *casuistries and disputes* as to *proximate* causation, the change from rule 18 \* \* \* is a delusion and a sham."

The learned editors aforesaid say, however:

"\* \* \* \* the law will now be unquestionably clearer".

If our law is to be like that of England and the other great nations, which have adopted the Maritime Conventions Act, the rule of *The Umbria* has only to be still followed on the question of contribution. And the English cases bearing on Article 16 are no longer authority on said question of contribution, but only on the question of *construction*.



Counsel contends, however, that the English statute creating a presumption of fault has been exactly and identically followed by the American courts without the aid of any statute. This is only true, however, to a very limited and very legitimate extent, illustrated by the rule in the case of *The Pennsylvania*. This rule is that when

“a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collision, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster”,

and that

“In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.”

We have already illustrated in our main brief (p. 121) what is meant by “at the time of collision”, showing clearly that we do not refer to a violation “at the moment of impact” (appellee’s brief, p. 75, misconstruing our contention), and we again repeat for the sake of clearness. The real point is this: If a vessel violates a rule, and that violation can possibly be said to be not overcome at the time of the collision, then the rule of *The Pennsylvania* applies. If, however, the violation be overcome before the collision, the rule does not apply. The underlying object of Article 16 was to bring vessels to a standstill before a collision could occur (see Protocol of Proceedings, pp. 407-509). If that object is not attained, a vessel will be in fault at the time of the collision for her prior violation of the rule in question.

If, however, the object is attained, that violation is not a fault existing at the time of the collision.

Now in *The Pennsylvania* case, the bark Troop was ringing a bell instead of blowing a fog horn, as required by the rules. This was a false signal, as held by the court, and meant that she was not under way, which was not the fact. Moreover, the bell was only heard but a moment or two before the collision, while the vessels were only three or four hundred feet apart (not, as counsel states, "for a considerable period of time"). It was a clear violation of a rule "at the time of the collision" under the above definition. This rule was also applied in *Martello v. Willey*, 153 U. S. 70, cited by counsel in parallel columns with *The Britannia* case. In that case the Martello heard but one blast of the Willey's fog horn (which was not a mechanical one, as required by the rules) before the collision and was, therefore, clearly in fault "at the time of the collision". The case is expressly rested upon that of *The Pennsylvania*. In *Merchants & Miners Co. v. Hopkins*, 108 Fed. 890, also cited, the vessel failed to blow her fog horn at all. In *The Admiral Cecille*, 134 Fed. 673, the vessel at the time of collision was moored in a prohibited anchorage and was thus in fault at the very time in question. It is doubtful, however, whether the rule of *The Pennsylvania* applies in such a case, since there are numerous decisions to the contrary which Judge Hanford failed to notice (see our main brief, pp. 86-87). The remaining cases cited on this point have, we believe, already been sufficiently distinguished (*id.* 120-121). While there may be and probably is sufficient reason for applying

the "but for" rule to a vessel in fault "at the time of the collision", there is no justifiable reason, apart from statute, for applying it to a vessel in fault six minutes before the collision when that fault has been clearly overcome, as it was in the case at bar.

It seems appropriate at this point and in this connection to take up counsel's discussion of the case of *The Umbria* (166 U. S. 412). It is admitted that Rule 16 was not then in force and that Rule 18 only required a vessel to "stop and reverse if necessary". If it was "necessary" in that case, therefore, for the *Iberia* to stop or reverse, *she violated a statutory rule in not so doing*. Yet it was clearly held that this violation, even if committed, did not contribute to the collision, the reasons for this conclusion having been fully stated in our main brief. The case of *The Umbria* may not still be authoritative (although there is strong ground for holding that it is) as to *when* a vessel must stop her engines,—in other words it may no longer constitute an authoritative *construction* of Rule 16, but (and this is the vital point) it still constitutes the test as to when the violation of that rule is to be held *contributory to the collision* in a legal sense. And on this latter subject it has been applied over and over again since Rule 16 was adopted, as shown by the cases in our opening brief. Counsel has failed to grasp the two-fold aspect of the decision and, in so failing, has fallen into error in his statements. Moreover, if there be any inconsistency between the case of *The Pennsylvania* and that of *The Umbria*, the latter must clearly prevail, but we submit that there is no such inconsistency because *The Penn-*

*sylvania* case is limited in its application to the violation of rules at the time of collision.

It is further true that in the case of *The Georgic*, 180 Fed. 863, Judge Hough says that the rule of *The Umbria* as to *when* the duty to stop arises has now been changed by Rule 16. Even if we admit this to be true, however, it simply means that that part of the decision tending to show that the *Iberia* was *not at fault* for not stopping is no longer applicable, but it does not mean that the entirely separate and distinct rule *as to contribution to the collision* has been changed in any way at all, or that the result of the case would have been different had Rule 16 been in force. And let us here say once and for all as to the case of *The Georgic*, that neither vessel had entirely overcome its headway before the collision and both contributed thereto. As regards its *construction* of Rule 16, the case has already been sufficiently commented upon.

We next propose to take up the cases of *The St. Louis* and *The Admiral Schley*, and, in this connection, to deal briefly with the alleged position of the "Selja" at the time she was sighted by the "Beaver". The language of the concluding part of *The St. Louis* decision to the effect that if the Delaware were reversed and moving backwards it could not be held that her fault was contributory to the collision is admittedly only a dictum (although the unreported decision of the lower court on this subject is by no means a dictum and, as the case was reversed on the facts only, is an authority not only squarely in point, but approved by the higher court), but the dictum of



an appellate court is certainly entitled to most respectful consideration and cannot be brushed aside as lightly as counsel would have it. It is claimed, however, that even if the dictum be accepted as authority, it is not applicable to this case, because the "Beaver" and "Selja" were on *crossing* courses and at the moment of impact the "Selja" was backing at right angles across the "Beaver's" bows. Now it may be that when the vessels struck they were nearly at right angles, caused by the "Selja's" swinging to starboard, first by drifting under her stopped engine, and then through reversing. But to claim that the "Selja" was "backing at right angles across the 'Beaver's' bows", as counsel insists over and over again, as if there was some magic in the phrase, is arrant nonsense even if the statement be literally true. At the risk of lengthening this subject too much, we extract the following evidence from the cross-examination of Mr. James Dickie:

"Q. Mr. Dickie, if the 'Beaver' struck the 'Selja' at right angles, and the scars on the 'Beaver' were in the condition that has been described to you, would that show that the 'Selja' was crossing the 'Beaver's' bows at right angles astern at the moment of collision?

A. It would show she was going astern beyond question.

Q. It would show that the 'Selja' was crossing the 'Beaver's' bows going astern at that time?

A. She could not be crossing the bows if she was going astern.

Q. If she were at right angles to her, she would be, would she not?

A. Oh, yes, if she was crossing the bows going astern first, yes.

Q. And at right angles to her, if the blow was at right angles?

A. If the blow was at right angles; there is two ways in which you can account for blows; you can account for hitting at the angle which the blow shows, or you can account for its striking at right angles by the 'Selja's' going astern.

Q. That of course would indicate that she was crossing the bows of the 'Beaver' and going astern at the moment of impact?

A. It would be that she was nearly across.

Q. Nearly across. A. Because, hitting the forward end of the 'Selja', that is quite a distance from the stern.

Q. Presuming, according to your statement, she had——

A. (intg.) She had gone astern about 100 feet.

Q. According to your theory. A. According to the calculation, from the testimony, we are correct; so that she would have been nearly in the middle when she started to back, the 'Selja'. The 'Selja' must have been nearly in the middle, that is, if the 'Selja' had laid still, she would have been hit about amidships, a little abaft of amidships.

Q. If she struck at right angles it would indicate that the 'Selja' was going astern? A. Yes.

Q. And crossing the bows of the 'Beaver' at about right angles?

A. At about right angles. Generally you do not talk about a ship crossing the bow by going astern.

Q. Well, but it is a fact?

A. It is a fact that that is crossing the bow.

(II, 453-455.)

The fact is that the "Selja" on her S 65° E course, after stopping her engines at 3:10, drifting ahead and then reversing on seeing the "Beaver" at 3:15, naturally swung to starboard. It is admitted that both these acts were proper, the only claim being that they should have been performed sooner than they were. Yet, because these acts threw her more across the "Beaver's"

course, counsel has the temerity to assert that in backing she was running into instead of away from a collision. Such a claim refutes itself.

But suppose that the vessels were on crossing courses. This was exactly the situation in *The Belgian King* case (125 Fed. at p. 877). And we here paraphrase what the court there said, using the word "Beaver" for "Belgian King" and "Selja" for "Tellus":

"The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill before she could collide with a vessel which she could see through the fog \* \* \*. That the 'Selja' observed this rule and that the 'Beaver' did not is established by the testimony as to the rate of speed each vessel maintained prior to the collision, and the fact that at the time of the collision the 'Selja' had stopped and the 'Beaver' had not \* \* \*."

The fact that the vessels were on crossing courses makes absolutely no difference in this case. The dictum of *The St. Louis* is equally applicable to the case at bar. The "Selja" stopped in time to avoid a collision. The "Beaver" did not.

But the case of *The Belgian King* is fortunately not the only case cited by us where the vessels were on crossing courses. In *The Umbria*, the *Iberia* and *Umbria* were on such courses and so were the *Commonwealth* and the *Volund* in the case of *The Commonwealth*, 174 Fed. 694, where the court did not, as counsel seems to think, decide that the *Volund* stopped on hearing the *Commonwealth's* first whistle, but expressly refused to decide it. If the "Selja" was backing across

the "Beaver's" bows, so also was the Volund doing the same thing in the case cited. The application of the rule as to contribution does not depend on the relative position of the two vessels, but on their ability to come to a standstill before a collision can occur.

The case of *The Admiral Schley* is also strongly relied on in this connection, but, as pointed out in our opening brief, that was a case of a vessel with a tow over 2,000 feet long loitering in the path of navigation and constituting an obstruction thereto. That case, however, cannot be used as an analogy to the case at bar, even if the "Selja" lay across the "Beaver's" course, and this is well illustrated by the case of *The Kentucky*, 148 Fed. 500, where the case of *The Schley* is clearly distinguished. In that case the court said:

"2. It is true that the Exeter City in being to the northward of a prolongation of the axis of the channel, between it and the northernmost side of the approach, was lying across the track of inward-bound shipping, but whether she was in fault for doing so has been the most strongly contested point in the case."

\* \* \* \* \*

"As a matter of common prudence, I should say that a course to the south side of, or entirely outside, should have been adopted, but did the neglect to observe either of these precautions contribute to the collision so as to render the Exeter City partly in fault? It seems not. This collision happened upon the open ocean. The obstacle which the Exeter City presented to the Kentucky was small, her length of 286 feet and her diagonal position to the Kentucky made it about 200 feet as compared with 2300 feet, the length of the tow in *The Admiral Schley*, 131 Fed. 433, 65 C. C. A. 417, and *Id.* (C. C. A.) 142 Fed. 64, relied upon by



the Kentucky here. *Moreover, that case appears to have turned largely upon the condemnation which the courts are apt to visit upon the navigation power of tows of great length when they get into collision through such fault. It does not seem to be applicable here.*"

\* \* \* \* \*

"This collision seems to be entirely attributable to the Kentucky. Her fault of excessive speed in a fog is plain and sufficiently accounts for the disaster. In order to attribute fault to the Exeter City, it would be necessary to resort to an involved state of affairs and consequent uncertainties, which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel."

In the case of *The Commonwealth*, supra, it was expressly contended that the Volund was lying directly across the course of the Commonwealth. The court there says:

"The next important question is whether the Volund was in fault for adopting the course of south  $\frac{1}{4}$  east, which caused her to expose her broadside to any vessel intending to pass through the channel to the westward."

\* \* \* \* \*

"Although undoubtedly there was great danger in exposing the broadside of the Volund to any vessel navigating on the usual course through the Race, the master of the Volund was not bound to anticipate that any vessel which he would meet would be transgressing the law as to speed. I find nothing to indicate that if the Commonwealth had been proceeding at that moderate speed which the law demands, the course of the Volund would have interposed any obstacle to the Commonwealth's progress which would not or could not have been avoided by ordinary care and good

seamanship. The Volund was endeavoring to reach the southerly side of the channel from the beginning of her change to the southward and when the Commonwealth came on the scene, the Volund was already somewhat to the south of the center line. The space that she was required to traverse across the channel after making Race Rock was not more than about 2 miles and the time required to cross it was inconsiderable. *If the Volund had been somewhere else this collision would not have occurred but that she happened to be in the dangerous spot when the Commonwealth came along can scarcely I think be deemed negligent on her part.*

“In *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, a case of collision between that steamer and the *Iberia* in a dense fog off the coast of Long Island, the *Iberia* was undoubtedly an obstacle to the progress of the *Umbria*, yet she was not found at fault, the court holding that the *Umbria* was gravely in fault for excessive speed and solely liable. In *The Kentucky* (D. C.) 148 Fed. 500, a case in this court not appealed, the other vessel in the collision, the *Exeter City*, was at the time of collision lying at the mouth of Gedney Channel, across the track of incoming vessels and was collided with by the *Kentucky*, which was about entering the channel. It was held that the *Kentucky* was solely in fault for excessive speed. I have not been referred to and am not aware of any authorities which hold a vessel in the *Volund*’s position in fault for being in the *Commonwealth*’s track.”

We submit that in this case the mere fact, if true, that the “*Selja*” lay in the track of the “*Beaver*” does not put her in fault. The case is entirely different from that of the *Schley* with her 2000-foot tow. Moreover, as before pointed out, the tug in *The Schley* case had

been unable to come to a standstill before the collision and was, therefore, in fault. We cannot, therefore, regard *The Schley* case as in any way in point, much less as conclusive of this litigation. But even if it were in point, the mere fact that an application for certiorari was refused by the Supreme Court would lend no added weight to it (see *Anderson v. Moyer*, 193 Fed. 499, 505-7).

Counsel says that it is significant that no case can be found where a vessel has been absolved where Rule 16 has been violated and where, "but for" its violation, the collision would not have occurred. We would respectfully refer him to the cases of *The Belgian King*, *The Commonwealth*, *Dunton v. Allan S. S. Co.* and the dictum in *The St. Louis*. And we in our turn might remark that it is significant that he has been unable to cite a single case where a vessel moving astern at the time of a collision has been held liable for a prior violation of Rule 16. Moreover, it will not do for counsel to confine the inquiry to violations of Rule 16. Violations of any rules, according to him, bring the "but for" rule into play. Yet we cite in our opening brief numerous cases, both English and American, excusing such violations even though, "but for" the same, the collision would not have occurred (see for instance pp 74-76, 82, 86-87, 89-90). Counsel apparently has not found these important cases even worthy of comment in his very able brief. We submit that the "but for" or "sine qua non" rule (unless expressly made applicable by statute) would be an absolute anomaly in the law of admiralty, except in

a very limited class of cases such as that of *The Pennsylvania*. It cannot properly be applied to cases in general without violating elementary principles of general law. Indeed, as counsel well says, "we need not add that the burden of proof *in all cases of negligence* is on the plaintiff to show not merely the act of negligence, but the fact that such negligence contributed to the disaster; that is, to the collision" (Appellee's brief, p. 53). And we need not further add that this rule is the same even though the negligence be the violation of an express statute.

21 *Encyc. Law* (2 ed.) 480 and cases there cited;

29 *Cyc.* 439-440;

*V Thompson on Negligence*, § 6315;

*Bear v. Chicago etc. Ry. Co.*, 141 Fed. 25, 28.

A particularly applicable case on this point is that of *Berry v. Sugar Notch Borough*, 191 Pa. State 345; 43 Atlantic 240. A motorman was there running his car at a greater speed than allowed by a city ordinance. A tree fell on the car and injured him, and it was contended that his violation of the ordinance showed contributory negligence and barred his recovery. The court said:

"\* \* \* it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running that brought the car to the place of the accident at the moment when the tree blew down. This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at



the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as well have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety."

This reasoning is cited because it is so similar to that in the case of *The Umbria* and shows the absurdity of the "but for" rule.

In the lower court counsel relied on the case of *Hayes v. Mich. Cent. Co.*, 111 U. S. 228, 241, which we refer to in case counsel should now use the same against us. In that case a railroad company running through a public park (used as a playground for children) failed to put up certain fences to secure persons and property as required by law. A deaf and dumb boy strayed onto the track and was run over. The lower court directed a verdict for the defendant, and the United States Supreme Court reversed the judgment, holding that the case was one for the jury, using certain language which counsel contended was an application of the "but for" rule. Now unquestionably in that case the violation of the statute *proximately* caused the injuries unless the plaintiff was guilty of contributory negligence, and we think it would surprise the Supreme Court to be told that it held, in the teeth of the numerous decided cases, that every violation of a statute brought the "but for" rule into play. In that particular case, *if* the violation of the statute was a cause *sine qua non*, it was a legal cause, but this is not true of most

cases. The court should note in connection with this case the remarks of Judge Taft in regard thereto in *B. & O. R. R. Co. v. Anderson*, 75 Fed. 811, 812-813.

Practically all of the foregoing discussion has been based on the theory that Rule 16 was in fact technically violated. As regards the proper construction to be given that rule, and as to whether it was applicable to this case, we feel that we can well rest on our main brief. We do not feel, however, that counsel has fairly stated our construction of the same in Section VI of his brief (pp. 60-65). Not a word is said by us tending to show that the master is not to blame if he concludes there is no danger, nor to the effect that he need only ascertain the position of the other ship "by an approximation of accuracy". Our position was very simple. We said that all the collision rules were passed with reference to *danger of collision* and, if there was in fact no danger of collision in a particular case, the rules were not applicable and we cited cases to prove this. We also said that, if a master ascertained this fact *and ascertained it correctly*, there was an ascertainment within Rule 16. In this case, up to 3:10 p. m., Captain Lie considered that the vessels were so far apart that there was no danger of collision, and he was correct in that supposition at that time. How our argument could have been twisted into the construction given it by our opponents we are unable to imagine. Counsel says that *the object* to be gained by the rule was "time and space between the ships until navigation should become safe by the knowledge each should get of the position of the other". The

“Selja” allowed six minutes of time and two miles of space, and we contend that that was ample. She could have avoided the collision with ease had the “Beaver” been half as careful in her own movements.

As regards the case of *The Belgian King*, counsel seeks to distinguish it upon the ground that the “Tellus” *had ascertained* the Belgian King’s position, which argument is squarely met in our main brief. It is also squarely met by the headnote in the case, placing the decision that the “Tellus” was not at fault squarely on the ground of her “*having come to a stop before the collision*”. The mere fact that the case is not referred to in *Marsden on Collisions* is of no importance, since that work is an English one and comparatively few American cases are cited.

There is little that need be said as to appellee’s argument on the major and minor fault principle. Counsel says that the “Beaver” was “on a course apparently clear of ships because no whistles were heard”, which is clearly not the fact (see Kidston, III, 855-858, 885-887; Ettershank, II, 539-541). And when he further says that the “Beaver” was unconscious of impending danger, and hence the greater moral fault was with the “Selja”, we are astounded. Here was a ship proceeding recklessly at full speed in the fog. Why she did not hear the “Selja’s” strong whistle will always be a mystery. Perhaps it was because of her great speed and the noise made by her engines. Perhaps her lookout, who had been drinking, was negligent. Her unconsciousness of impending

danger in no way justifies her reckless speed in a dense fog. Moreover, she unquestionably violated paragraph 2 of Article 16 and other rules besides, as shown in our main brief. The "Selja", on the other hand, proceeded with caution. She was not conscious of danger, but knew there was no danger. And she was possessed of the ability at all times to come to a standstill before any collision could occur. Finally counsel admits that her conduct was not a proximate cause of the collision, but merely a *causa sine qua non*. That the greater fault should lie with the "Selja" under these circumstances is something we cannot fathom.

The foregoing is, we believe, a sufficient answer to all contentions made under Rule 16. We have said little therein as to the testimony quoted by counsel, because we believe it to be of no great materiality. Counsel is, of course, justified in segregating those portions of Captain Lie's evidence which are most favorable to his contentions, and we can only ask the court under the circumstances to read his whole evidence. It was obviously impossible to keep all of the "Selja's" officers here for the trial of this case, but, owing to its importance, Captain Lie was kept here and on him, almost single-handed, fell the burden of meeting the appellee's case. He was put through a most grilling cross-examination and was recalled again and again for more of the same as new ideas occurred to counsel (something which would not have been allowed had the evidence not been taken before



a Commissioner). And, after reading his evidence, we think the court will find that he was an honest man and acquitted himself with credit. Counsel makes much of the captain's mistaking the "Beaver's" whistle for one off the Golden Gate, over twenty miles away, but, as Captain Lie well says, he did not have in mind exactly where the Golden Gate was at that time (I, 220). The mere fact that he had before noted the Fort Point bearings would not necessarily prevent this impression, and counsel seeks, in our opinion, to apply a rather Spartan standard to a Norwegian captain, who had only sailed into San Francisco twice before, one of which times was from the south (I, 148, 149). Counsel also claims that Captain Lie should have consulted with his officers and crew on hearing the "Beaver's" whistle. The evidence, as pointed out in our main brief, is that he did consult his first and third officers who were on the bridge, and both agreed that the whistle was far off (I, 218-219). We think that this was all that was required of him, especially as it later proved that this judgment was correct. However, we see no necessity at this point of going into all the testimony recited by counsel. The vital fact remains that the engines of the "Selja" were stopped six minutes before the collision, while the vessels were still about two miles apart, and at the time of the collision the "Selja" was moving backward. At any time the "Selja" could have come to a standstill before meeting the "Beaver", but nothing she could have done would have prevented the "Beaver" from reaching the point of intersection of

the two courses. Under the rule of *The Umbria* case, therefore, the fault of the "Selja", if fault there was, did not contribute to the collision.

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## II.

### The "Selja's" Alleged Violation of the Moderate Speed Rule.

While we do not admit that the "Selja's" speed of six knots up to 3:05 p. m. was immoderate, we will treat it as such in discussing this contention. Counsel seems to fail to appreciate the difference between a vessel proceeding at six knots up to a point where she cannot avoid a collision after coming in sight of another vessel, and another vessel which, for five minutes before the collision, is drifting under a stopped engine and at the time of the collision is actually backing.

"\* \* \* if she had been running dead slow for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been."

*The Ludvig Holberg*, 157 U. S. 60.

"While it is quite clear from the evidence that the *Georgia* had been violating the rules of navigation as to speed, still this condition did not prevail at the time of the collision."

*Balt. Steam Packet Co. v. Coastwise Tramp Co.*,  
139 Fed. 77.

"The general consensus of opinion in this country is to the effect that a steamer is bound to use

only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

*The Umbria*, supra.

See also

*The Chattahoochee*, 173 U. S. 540;

*Deslions v. La Compagnie Generale Transatlantique*, 210 U. S. 95, 114;

*Appellant's Opening Brief*, p. 122.

If a vessel is making but two knots, or bare headway, under circumstances which preclude the possibility of her stopping before colliding after she comes in sight of another vessel, even that speed would be immoderate. Applying the rule to this case, it is apparent that the speed of the "Selja" was moderate, and that counsel should attempt to argue the contrary is but indicative of the weakness of the whole case against the Norwegian vessel. And we again ask counsel to explain *why*, if a violation of the moderate speed rule can be overcome so as to excuse a vessel, a violation of the latter part of the same rule cannot also be overcome.

We submit that in neither the one case nor the other does the prior violation of the rule contribute to the collision.

## III.

**The Claim That the "Selja" Violated Rule 29 in Not Reversing at or Before 3:10.**

We believe that this fault also is clearly covered by our last argument. It must be remembered, however, that at 3:10 the "Selja" was making but 3 knots, not 6; indeed, attempting to hold us to the strict letter of the translated log, appellee says that at 3:10 the "Selja" was "nearly at a standstill". Under either situation we submit that the stopping of the engine was all that the special circumstances called for. At that time the vessels were 1.54 knots, or nearly 1.8 statute miles, apart and the uncontradicted evidence is that if, while making 3 knots, the "Selja's" engine should be reversed she would come to rest in the water after advancing only 220 feet. The fog would permit of Captain Lie seeing the "Beaver" within two ship lengths, or 900 feet. Under these circumstances good seamanship did not require Captain Lie to reverse his engine before coming in sight of the approaching steamer, for he knew that, when that exigency should arise, he could bring his vessel to a stop before reaching the intersection of the two courses. Of course, if he is to be charged with knowledge of the reckless navigation of the "Beaver", then of a certainty he would have avoided the collision by reversing at 3:10, but Captain Lie did not know, nor was he called upon to guess, that the "Beaver" was racing towards him at her full speed,—he did not know that she could not possibly perform her share



of duty when the vessels should come in sight of each other.

Counsel relies strongly on the case of *The Ceto*, L. R. 14 App. Cases 670. In distinguishing *this* and other cases the Supreme Court, in the case of *The Umbria*, says:

“In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the *Iberia*, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been a fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the *Iberia* would have been of the slightest avail, in view of the extraordinary speed of the *Umbria*. It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the *Umbria* reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect.”

The duty to reverse, as well as the duty to go at a moderate speed, is fully met where a vessel so maneuvers that she is able to stop before colliding

with an approaching vessel. The "Selja" did her full duty in this respect. *The "Beaver" did not do it.*

We cannot resist referring to a glaring inconsistency in counsel's argument on this subject. He here claims (brief, p. 88) that the preliminary sailing rule of Article 17 as to how to ascertain risk of collision *does not* apply in a fog. In discussing Rule 16, however, he says that "it is but common sense that it (Article 17) would apply *a fortiori* in a fog" (brief, p. 65). This inconsistency is but in line with the inconsistency in claiming violations of both Rules 15 and 16.

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#### IV.

#### The Alleged Violation by the "Selja" of Article 15.

The first portion of appellee's brief on this point deals with "*the extraordinary story told by the 'Selja's' officers*" (pp. 96-104), and the brief later refers to "*the remarkable series of coincidences*" of libellant's case (pp. 142-147). It would seem appropriate to first take up these vague and general arguments before dealing with any specific contentions.

As stated in our main brief, the evidence of all of the "Selja's" officers was taken on December 2nd, 1910, only ten days after the collision, before appellee's defense had been even outlined, and when all the events were fresh in the minds of the witnesses; whereas, the evidence for the "Beaver" was taken after the lapse of many months. The "Selja's" officers had

no chance to construct any fine spun theories as to the effect of the swell on their vessel, the overrunning or underrunning of her log, the variations of her compass, the soundings shown by charts, etc. Their evidence was as to *the facts* as they believed them to be. They testified, as the record shows, in a straightforward and truthful manner, and we think that the court will believe their evidence as against mere *inferences* sought to be drawn by counsel for appellee from collateral facts. Counsel did not even see fit to cross-examine these witnesses (with a few minor exceptions), and accepted their statements as to effects lost in the collision as absolutely correct. Yet *now* it is said of their evidence: "Would it not tax the strongest credulity to believe it?" and "It is well to consider the extraordinary story told by the 'Selja's' officers." Counsel would have the court believe (for there is no other conclusion from his argument) that the witnesses did not hear the Point Reyes siren *at all*, that the courses of the "Selja" were not as testified to by them, and that the movements of her engines were not as testified to. In plain words, he considers their evidence a tissue of falsehoods.

We do not think that this court will so hold. If the witnesses were making up a case, why, in the name of common sense, did they not make up a better one? If they were perjuring themselves as to sounds, courses and movements of no very great materiality, it would have been very easy for them to have testified that the "Selja" *did* stop on hearing the "Beaver's" first

whistle, and that she blew two whistles before sighting the "Beaver". And they could have done this with impunity under the well established principle of law that their evidence as to the movements of their own vessel would be preferred to that of the "Beaver" as to such movements. *If* they were falsifying they might as well have gone the whole length. *But they were not falsifying.* Their stories are absolutely consistent and bear the impress of truth.

Let us now take up a few of the matters which counsel considers so "extraordinary". The explanation of the "Selja's" two changes of course to the westward is clearly shown by her log, as pointed out on page 5 of our opening brief, and this evidence was clearly competent (*The Kentucky*, 148 Fed. 500). We have also already explained, so far as it needs explanation, Captain Lie's thought that the "Beaver's" whistle was one off Point Bonita (*supra*, p. 22). Counsel further makes much of Captain Lie's statement that the Point Reyes fog signal had been changed without his knowledge. But what is there remarkable about this? As the captain truly says, a fog signal is often altered (Lie, IV, 1175). Captain Lie knew that the signal he heard was the Point Reyes signal *because it could not have been anything else.* Point Reyes was the very point they were making (Bjorn, I, 110). Almost every officer testifies that it was the Point Reyes signal and its distance away is also at least approximately established. Counsel does not and cannot suggest what other signal it could have been.



We, therefore, again submit that it is absolutely established that the "Selja" heard the Point Reyes whistle at the times testified to, that she was on the courses testified to, and that her engines ran as testified to, and this in accordance with the well known rule that the testimony of witnesses aboard a vessel as to what she did is to be preferred to the testimony of those on another vessel.

We have also examined carefully the statements on pages 142 and 143 of our opponent's brief and fail to find anything singular or remarkable in the facts therein detailed. They only become singular through counsel's *way* of stating them. The times and distances therein mentioned are testified to by the master and officers of the "Selja" as approximate times and distances, not as *exact* times and distances. Lie's plotting on his chart does not, of course, represent the exact situation, but simply the situation as nearly as the witness could figure it out. The method of attack on this evidence is not one which commends itself to us nor do we believe that it will commend itself to the court. If the story of the "Selja's" officers in detailing the courses and movements of their vessel was a tissue of falsehoods (and that it appears so to counsel is plain from his argument), why were they not cross-examined? Counsel then had the two-whistle rule in mind, as shown by his cross-examination of the chief engineer, yet he made no endeavor to break down the "series of coincidences" testified to by these men. We do not believe that the court will discredit

the positive and apparently straightforward evidence of these witnesses on any theory yet adduced in this case. They were presumed to know what happened on board the "Selja" and their testimony cannot be read without believing that they did know and truthfully testified thereto. It will take more than mere alleged discrepancies in soundings or theoretical evidence as to the speed of the "Beaver" to dispute this.

Counsel's argument as to the *soundings* taken on the "Selja" is met on page 30 of our opening brief. Assuming that the soundings shown on the chart are inconsistent with the *exact* course plotted out by Captain Lie, which we do not admit, it is a very minor point in the case. At best it only shows that Captain Lie was a little further from Point Reyes than he thought he was, and proceeding a little faster than he thought, and it in no way affects the evidence as to the *substantial* accuracy of the courses and distances run by the "Selja". Although the testimony of most of the "Selja's" officers is branded as perjured, the evidence of Larsen as to the soundings is accepted as correct. Yet, when we come to examine Libellant's Exhibit Kidston No. 1, we find that the point of collision *as fixed by Captain Kidston* (III, 930) is equally inconsistent with Larsen's soundings for the nearest sounding inside is  $31\frac{3}{4}$  fathoms and outside  $32\frac{1}{4}$  fathoms. If the soundings contradict Captain Lie's evidence they equally contradict Captain Kidston's. It is possible that Larsen, testifying from memory, may have made a mistake.

Counsel says that the identity of soundings “from 2:45 to the time of the collision” is “persuasive evidence that the vessel had been at a standstill for some time before the collision”. In other words, the claim is now made that the “Selja” came to a standstill at about 2:45, *half an hour before the collision*. Not only does this claim destroy the last possibility of reliance on any violation of Rule 16, but it presents a situation which is absolutely ridiculous on the face of the testimony. Such a situation *cannot be conceived*. Not only this, but it is contradictory of appellee’s sworn pleadings, which admit that *after 3 p. m.* “the ‘Selja’ continued on her course without stopping her engines for many minutes at *a high rate of speed* in said fog, to wit, *more than 6 knots per hour*” (I, 24-25). This very fact is made the ground for one of appellee’s charges of fault against the “Selja”, and we do not think the court will allow this solemn admission to be disregarded at this late date.

It may be that, judging from the chart alone, the soundings testified to by the second officer do not coincide with the line A. B. or even the line I. F. D. E. on appellee’s drawing on page 145 of its brief, but to say that this discredits the whole of libellant’s case is going, we believe, further than this court will care to go.

See in this connection:

*The Newport*, 36 Fed. 910.

Captain Lie repeatedly testified in this case that the soundings reported to him were 29 and not 35 (see, for

instance, pp. 1187, 1201). He also said that he built his chart on what he experienced on the bridge and not on soundings or anything said after coming ashore (Lie, IV, 1187). That there may have been a mistake as to the soundings is possible. That Captain Lie's diagram may be incorrect in certain particulars is also possible. But it is *not* possible, we submit, to disregard the evidence of Captain Lie and his officers as to the movements on their own vessel and to say, as counsel does, that Captain Lie did not know where he was within twenty miles and was waiting at a standstill for the fog to lift. To do so is to brand libelant's evidence as out and out perjury. No more lenient explanation is possible.

As pointed out in our main brief, the basic fact in this case is that the "Selja" heard the Point Reyes siren at 2:30 p. m. while on a course of S 60° E. If this fact be accepted, appellee's theories fall to the ground.

There is much more that might be said in answering that part of appellee's brief which is now in question. We do not feel, however, that anything could be gained by saying more. The whole question depends for its determination on whether the court will reject the testimony of reputable men on the "Selja", whom counsel did not see fit to cross-examine and whose statements as to personal effects lost in the collision he took as absolutely correct.

Having discussed certain generalities in appellee's argument (we have not even pretended to discuss



them all), we now turn to the contentions made under sections "a", "b" and "c" of the brief (pp. 104-141).

#### A. ADMISSIONS, ETC., AS TO "SELJA" BEING AT A STANDSTILL.

This subject is quite fully treated in our opening brief (pp. 44-50), but will be discussed further in view of appellee's argument. Counsel claims that, if the log says that the "Selja" was *nearly* at a standstill at 3:10, she must have been *actually* at a standstill at 3:15, entirely overlooking the fact that the log also sets forth the vessel's prior speed and hence shows that she could only be *nearly* at a standstill so far as her prior speed permitted her to be.

The evidence of Inspector Bulger, already fully commented on, is next set out in full and it is said that, while he noticed the discrepancy in Lie's statements at once, he wanted to wait and check it up by the chief engineer. In view of this remarkable statement it is worth while to set out what the testimony before Bulger *was*:

"Q. If you were stopped 5 minutes why didn't you blow two whistles?

A. Because she was going ahead yet.

Q. When the engines are stopped does the law say you shall blow two whistles? A. No.

Q. Your vessel is practically stopped at that time?

A. No, as soon as my vessel has headway, I cannot blow 3 (2) whistles.

Q. Your engines were stopped 5 minutes and you still had headway? A. Yes, sir.

Q. How fast were you going through the water?

A. 3 or 4 knots. She would not slow herself in 5 minutes. She will only swing around—a tramp like that.

\* \* \* \* \*

Q. As soon as she backed her stern would go to port. Was she on the point of stopping?

A. As I said before, when I blew 3 whistles I was then at the point of blowing two whistles to show that I stopped, then the steamer loomed up and she blew 3 whistles at the same moment, then I backed engines and blew 3 whistles.

\* \* \* \* \*

Q. When you blow two whistles your ship is stopped through the water?

A. Yes, sir. That means the ship is done in the water.

\* \* \* \* \*

Q. When you stop your engines dead still you are virtually stopped?

A. We are not allowed to blow as soon as we stop our engines. We may be going 15 or 20 knots."

(Belger, III, 963-967.)

After reading this testimony to Belger the following took place:

"Q. Now, do you remember just at that point, that Inspector Bolles turned to you and said, 'When she is stopped through the water, when there is no way on her'; do you remember that?

A. Yes.

Q. Do you remember, Captain, that you were a little confused as to the meaning of the rule?

A. It looked that way, yes.

Q. It looked that way, and Bolles was setting you right in the matter?

A. Yes. I have a right to continue now, haven't I?

Q. Yes, I am not going to stop you. Now, do you see any evidence at all in that record of a

present recollection on your part—present at that time—of this statement that Captain Lie had made to you a few minutes before?

A. Just exactly the point where I had it too. I knew that if I could get the engineer's log and verify the 10 minutes I didn't want to go any further. I called for the log of the engineer and wanted to put the engineer on the stand at that time for the simple reason to find out *how long those engines had been stopped*, and taking the difference of time between that and the collision and finding out whether the statement he had previously made to me was correct or not. That was my object."

(Bulger, III, 967.)

"Q. I am asking you about how long it would take the ship to stop her headway; would the engineer know that?

A. The master of the ship would know it. He said he was looking over the rail and was waiting, with the mate's hand on the whistle, to see her headway stop in the water before he could blow the two whistles.

Q. How were you going to get from the engineer's log any data which would enable you to contradict or confirm Captain Lie's statement about the 'Selja' having been stopped in her headway for 10 minutes?

A. When the captain got on the stand he said her headway was nearly off after 5 minutes. I wanted to get *the bells* from the engineer to find out what time—we had the time from the captain—to find out *at what time the bells were rung to the engine room and then take the difference between the time and see whether that was correct or not*". (Id. 970.)

We submit that it is clear from this evidence that all Captain Bulger wanted the chief engineer for was to find out *when the engines were stopped* and not to find

out how fast the ship was going. Counsel's elaborately worked out theory as to the reason why we refused to allow the chief engineer to be called not only has no basis in fact, as shown by the foregoing, but is absolutely immaterial. Permitting these foreign witnesses to be examined before the inspectors was a mere question of courtesy, and no inference unfavorable to libelant can be drawn from his failure to produce them. This brings us, however, to one of the most remarkable features of this case.

On Captain Bulger's examination the witness expressly asked counsel for libelant whether any discourtesy had been shown to Captain Lie, and counsel gave him a very frank answer (III, 977). This answer, although of course not evidence in the case, was used by appellee as a pretext for calling *opposing counsel* as a *witness* in the case *to explain this and other statements made by him* (III, 981-1005). This entire examination was immaterial and irrelevant and we do not think the court should give it its approval. So far as we know it is wholly without precedent and was, in our opinion, highly discourteous. And there is not one word of evidence to show that counsel for libelant had any idea that Eggen would testify that his vessel would stop in three minutes. We will drop this distasteful subject right here.

We have already explained Eggen's testimony in this case (opening brief, p. 48). Counsel says that he testified the same way before the Norwegian Consul, but his evidence there was confined to a time "just preceding the accident" (IV, 1342). We have already also taken



up the alleged conversations on the bridge of the "Beaver". We disclaim any intention of charging falsehood to these witnesses or to Captain Bulger, but what we do say is that they must have misunderstood Captain Lie and that what he actually said, or at least meant to say, was that he stopped *his engines* at *ten minutes after three*. As he himself well says, "You must remember that I am not as good to explain myself in the English language as I ought to be" (IV, 1208).

In our main brief we did not take up the alleged admissions by Lie and Eggen to Mr. Frey on December 1st, 1910, which are now relied on by appellee. The only point of any value as regards Lie's admission is that he said he stopped his engines "about five minutes after hearing the 'Beaver's' whistles". This is contradicted by the testimony of all of the "Selja's" officers, by Eggen's alleged admission at the same time, and is so vague and general as to be utterly worthless. As to the memorandum of the conversation with Eggen, we do not believe that the methods employed to secure the same and of its later use will commend themselves to the court. The very day after the alleged statement was made Mr. Frey attended the taking of the depositions of the "Selja's" officers with his counsel, but said nothing as to Eggen's prior statement. His reason for this was as follows:

"A. Well, as matter of fact, to be perfectly frank about the matter, I certainly considered that the testimony given under oath would have more weight than a statement made in an informal way

in my office. At that time I did not consider that these statements were any more than office memorandum.”

(Frey, II, 716.)

Under these circumstances, after the chief engineer had returned to Norway and on July 18th of the following year, appellee produced Frey’s typewritten statement as to what Eggen said, and libelant was deprived of its right to contradict it. It was the duty of appellee to have confronted Eggen with his statement on December 2nd, and we believe that this court will so hold.

We do not feel that this court will pay much attention to the various alleged admissions, since the law is that they are entitled to almost no weight (opening brief, pp. 46-47). Indeed it is doubtful whether, as against the owner of the “Selja”, they can be used at all (*Packet Co. v. Clough*, 20 Wall. 528), except for the purpose of attacking Captain Lie’s veracity. We do not believe that Captain Lie made the admissions, and we have absolutely proved that, if made, they were untrue.

Counsel, however, lays great stress on the fact that none of the officers of the “Selja” were asked by us whether she had lost her headway before she began to reverse, also saying that this was a glaring fault of which it had been intimated by Mr. Bulger that she had been guilty. We have already recited the testimony taken before Inspector Bulger, on this point, and his only intimation of fault, if there was any intimation, was based on the *mistaken* belief that the two whistle rule applied to a stoppage of the engines and .

not the ship (III, 967). And, as we have also already pointed out, the depositions of the "Selja's" officers were taken before appellee's defense was even outlined and they then returned to Norway. Had we foreseen that this defense would be made, the officers would, of course, have been called on to testify. Counsel's inference is that they were not called on because their testimony would have been unfavorable, but *why* any such inference? If, as he claims, it would "tax the strongest credulity" to believe the story they did tell, the rest would have been easy. If they could perjure themselves as to facts which were not vital, they would certainly do the same as to facts which were vital. Here again we do not think that the court will follow counsel in his inferences.

Fortunately for us, however, counsel himself has put in the record express corroboration of Captain Lie on this point by Third Officer Bjorn, and he expressly pinned counsel for libellant down to an admission that Bjorn so testified and necessarily thereby offered Bjorn's evidence on this point as a part of his case:

"Captain said he is going a little ahead because there was a heavy swell from astern."

(IV, 1211-1212.)

The testimony is more fully stated in Captain Kidston's evidence (which surely may be used to explain the foregoing extract put in by appellee):

"Q. Was your vessel stopped before the collision?

A. Yes, sir, it was dead slow. Asked captain if I should give two whistles, but captain said he was

going a little ahead because there was heavy swell from astern.

Q. She was forging through the water?

A. She was moving a little ahead. I asked captain if I should blow two whistles, he said no, as she had way on."

(III, 845-846.)

All this took place, as shown by the context, when the "Beaver" was first sighted and just before the "Selja" blew three whistles, showing that she was reversing (see also Bulger, III, 972-973). This evidence clearly corroborates Captain Lie's evidence to the effect that he still had way on when the "Beaver" was first sighted, and in any event shows that he so expressed himself to the third officer at the time. And we once more point out that, if there is a *doubt* as to whether Rule 15 was applicable, that doubt must be resolved in favor of the "Selja".

We have referred in our opening brief to the evidence of the distinguished construction engineers and architects as to how long it would take the "Selja" to stop, and through them we have demonstrated that the proposition is one that can be worked out mathematically. Mr. James Dickie, on whose testimony we especially rely, is a man of international reputation, and his evidence on this point is based on a very vast experience—an experience greater in fact than that of any man on the Pacific Coast (III, 1063). This witness, like Captain Lie, was recalled many times for further cross-examination, and we earnestly ask the court to read the whole of his testimony bearing on this point very carefully. There is much of it that might be cited with telling



effect, but it can be better appreciated when read as a whole, and this brief is already too long. Counsel says that these experts disagree with Captain Lie as to when the "Selja" was stopped by about four minutes, because Captain Lie thought that she was just about stopped at the time the "Beaver" hove in sight. He admits, however, that he could not say exactly at what time she would absolutely be done in the water, and simply thought that she would be sufficiently done to allow him to blow two whistles (I, 262; IV, 1164). If, however, she was still going ahead, no matter how little, her captain would be justified in not blowing two whistles. Captain Lie's thought that she was almost done in no way conflicts with the evidence of the experts that in fact she would not be done.

It is all very well to say that our evidence on this point is "based on formulae made up from the launching pool", but the fact remains that no witness was called to contradict the expert testimony on this point, *nor could it be contradicted*. Counsel also intimates that these "formulae" are deceptive when applied to loaded vessels, but the experts took this fact carefully into consideration. As a matter of fact, the "Selja", on the voyage in question, was *very light*. Counsel himself took pains to bring this out (Larsen, I, 89), as well as the fact that it took a much longer time to stop a vessel which was light (Eggen, I, 76), presumably for the purpose of showing that the "Selja" would have her speed materially added to by the following swell.

After all, however, much must be left to a master's judgment in determining whether his vessel has any way

on her, and he should be most careful not to blow two whistles too soon under Rule 15. Even if it be true, therefore, that the "Selja" did stop in three minutes, it was a matter of much nicety of judgment to decide *just when* she was dead in the water. She was probably making a little over three knots at 3:10 (having dropped from a six knot speed) and could not stop at once, and any mistake would at most have been a mistake of but one or two minutes before the "Beaver" came in sight and the "Selja" reversed. Captain Lie thought that his vessel was still moving a little (and so told his third officer), and surely the court will allow that much to his judgment, since the matter is entirely one of judgment (see *The Lord O'Neil*, 66 Fed. 77).

We submit, in concluding this subject, that Captain Lie's alleged admissions as to a stoppage for ten minutes are inconsistent with the absolutely proved fact that the "Selja's" engines were not stopped till 3:10 P. M., and are also inconsistent with appellee's sworn pleadings. They, therefore, cannot be accepted, even if they were made, and with said admissions put aside the evidence is absolutely overwhelming to the effect that the "Selja" was not at a standstill at any time before sighting the "Beaver".

**B. CONTENTION THAT THE "SELJA", WHEN FIRST SIGHTED BY THE "BEAVER", WAS LYING IN THE TROUGH OF THE SEA AT RIGHT ANGLES TO THE "BEAVER'S" COURSE.**

Even if the above contention be established, we utterly fail to see how it has the slightest tendency to prove that the "Selja" had come to a standstill, for which

reason we consider the question of little importance. We will eliminate in the beginning the first four pages as to the swell, as coming more appropriately under the next heading. We admit that there was a westerly swell, the only dispute being as to how heavy it was, and this latter point in turn only affecting the "Beaver's" rate of speed, so we fail to see its pertinency in this connection.

We will also not go into the numerous citations of evidence made by counsel for appellee as to the *angle* at which the vessels approached each other.

In the first place, when the two vessels sighted each other, both were *in extremis*. And no great dependence can be placed on the evidence of either side as to the exact location of the other vessel. The "Selja", *as testified by all her officers*, was on her S. 65° E. course, but she had undoubtedly fallen off this course to some extent on stopping her engine. Although not dead in the water she obviously did not have steerage way for very long. Then, too, the "Selja" reversed her engine immediately upon the "Beaver's" coming in sight. This naturally tended to swing her to starboard (Bjorn, I, 118; Lie, I, 177) and further off her course. It is said by the appellee that the "Beaver" was also swinging to starboard. As to this, however, there is much doubt. In his report to the Inspectors Captain Kidston said that, after putting his helm to starboard, the "Beaver" swung a half point to port, that her engine was then put full speed astern, and that then her helm was put hard-a-port (IV, 1480). All these maneuvers took place within a minute or a minute and a half of the collision.

The claimant's answer alleged that, as a result of these maneuvers, the "Beaver" was swinging rapidly to starboard. Acting on this report of Captain Kidston's, which was certainly supposed to state the case as favorably as possible for the "Beaver", libelant asked his experts whether the "Beaver" would in fact be swinging rapidly to starboard under the conditions detailed in the report, and they answered no (II, 362-3, 431). Not only this, but counsel for the "Beaver" brought out on cross-examination that she would not only not be swinging "rapidly to starboard", but would be swinging to *port* (III, 1086; IV, 1222). Counsel says that he then offered to have an experiment made with the "Beaver", and that the experts then discovered that they had left out one element in the equation and that the "Beaver" *would* be swinging to starboard. It will be noted from the record, however, that we offered to co-operate with the claimant in making the experiment *along the lines of the questions that were put to the experts* (IV, 1306). Captain Kidston, however, did not testify at the trial in accordance with his report, but did testify that the hard-a-port order was given *before* the engine was reversed and, *under these changed conditions*, the experts said that the "Beaver" would be swinging to starboard (IV, 1363). The court can take its choice whether to believe the report of Captain Kidston made a few days after the collision or his changed testimony given many months later. We would also point out in this connection that Captain Kidston's *report* is borne out by Quartermaster Hanson, who says that the "Beaver" blew her three whistles (showing that she had her engines reversed)



before *he got* the order of *hard-a-port* (Hanson, II, 595). And the fact is that those whistles were not blown till the vessels came in sight of each other, as Captain Lie *saw* the "Beaver" blowing them. As the proposed experiment *based on this fact* was abandoned, we can only take it as a confession that under those circumstances she would not be swinging rapidly to starboard and very likely would not be swinging to starboard at all. If this be true, an approach at right angles would not show such a large falling off from the "Selja's" course of S. 65° E.

We do not think, moreover, that the testimony of the "Selja's" officers that the approach was at "about right angles" is very potent to prove anything in this case, as it is difficult to tell just what *time* this evidence relates to, and time is of the essence in this matter. As to the "Beaver's" testimony on this point, it is all suspiciously alike, each witness using exactly the same words ("in the trough of the sea") to describe the "Selja's" position. Here again also the *times* are not specified with accuracy. Chief Engineer Paul, for instance, says that he saw the "Selja" only "a couple of seconds" before the collision and that she was *then* lying in the "trough of the sea" (Paul, II, 603). But it is obvious that, with the "Selja" swinging to starboard under her reversed engines at that time, if she was in the trough of the sea two seconds before the collision, *she could not have been there* when the vessels first sighted each other. And Ettershank, who also gave testimony as to the "Selja" lying in the trough of the sea, says that he only saw the "Selja" *half a*

*minute* before the "collision" (II, 507). Furthermore, Paul says (II, 602) that at the time of the collision the "Beaver" was "heading right up to the swell". If this be true, and it also be true that she was swinging rapidly to starboard, she could not have been heading this way when she sighted the "Selja".

There is another potent fact which makes strongly against the "Beaver's" contention on this subject, and that is the position from which the "Selja's first whistle was heard at about 3:13½ P. M. On this point Captain Kidston testifies as follows:

"Well, then, I made up my mind that I might have been wrong; and when I heard the second whistle it sounded to me very close aboard. The officer who said he heard the first whistle said it was about *a point on the starboard bow* and I had swung about *a half point*, and that whistle seemed to me—I did not go to the compass—but it seemed to me to be *still about a point on the bow*, that she might be crossing our bow and there was only one thing for me to do, to stop and go astern and I put my helm a-starboard and tried to swing under her stern" (Kidston, III, 898).

If the first whistle was heard on the starboard bow at 3:13½, and the second whistle was heard at 3:14½ in the same place, although the "Beaver" had swung *half a point to port*, the only conclusion possible is that the "Selja" was still going ahead during this interval and could not have been at a standstill. Upon the whole, in view of these facts, we believe that Captain Lie's evidence as to the angle of approach is probably correct:

"A. That angle increased; that angle was increasing steadily, as my vessel swung, and I saw the 'Beaver's' sides. I was watching the 'Beaver'

carefully then and I thought probably she would pass wide of me; her starboard side was broadening all the time as I was watching her."

(Lie, I, 175.)

We also believe that the amount of both the "Selja's" and the "Beaver's" swinging to starboard has been greatly exaggerated by counsel, although we frankly admit that the "Selja" probably swung a good deal more than Captain Lie thought she did (note his testimony before Bulger, "She would not slow herself in 5 minutes. She will only swing around—a tramp like that". III, 965). The great truth remains that the "Beaver" penetrated the "Selja" for 18 feet on her port side and only 10 feet on her starboard side (Stewart, I, 138-139). Counsel's explanations of this are weak and inconclusive. We submit that it is a physical fact which cannot be escaped from and shows that the impact was not directly at right angles, and that the "Selja" was moving away from the intersection of the two courses.

But however all this may be, it still remains true that the evidence has no real tendency to show that the "Selja" was at a standstill for some minutes before the collision. Taking the view most favorable to the appellee, it can be fully explained by the fact that the swinging of the "Selja" was due to her having first lost her steerage way and then reversed her engines. We do not believe that all this complicated mass of theory and conjecture will cause the court to disbelieve the positive evidence of the "Selja's" officers that she was proceeding on a course of S. 65° E. and did not stop her engines until 3:10 P. M.

The contentions which we have just treated well illustrate the rule laid down in the case of *The Kentucky*, 148 Fed. 500, 504. There the Kentucky was at fault for excessive speed. A complicated theory was, however, presented to show that the other vessel was also in fault. The court said:

“This collision seems to be entirely attributable to the Kentucky. Her fault of excessive speed in a fog is plain and sufficiently accounts for the disaster. In order to attribute fault to the Exeter City, *it would be necessary to resort to an involved state of affairs and consequent uncertainties, which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel.*”

We submit that the same rule should be applied to the case at bar.

**C. CONTENTION THAT THE COLLISION TOOK PLACE ABOUT SIX MILES FROM POINT REYES AND NOT WHERE CAPTAIN LIE TESTIFIED.**

Considerable is said on this subject in our opening brief (pp. 22-30), but counsel's discussion of the same (appellee's brief, pp. 123-127, 136-141, 148-154) calls for some further reply. Said discussion deals mainly with the alleged distance traversed by the "Beaver". As before pointed out, we have an *admitted* rate of speed up to the Red Buoy, which, if continued, would bring the "Beaver" up to the point of collision as testified to by Captain Lie. We then have what our opponent would call a "remarkable coincidence", namely: a swell so great as to retard the "Beaver's" speed three knots an hour and cause her log to overrun. The swell, ac-



ording to counsel, was "comparable with the worst storms in midwinter", yet Captain Kidston says that he has made "as low as five knots in a heavier swell" (III, 864).

It was, of course, necessary at the trial to show some retardation of the "Beaver's" speed, if she was going at a fifteen knot rate, and this was accomplished by the evidence as to the swell. We do not say positively that there was not a heavy swell on that day, although we believe that appellee has made too much of it. Counsel says that there is no contradiction to the testimony that the "Beaver's" speed was cut down to 12 knots (brief, p. 150). The testimony of the experts that it could not be cut down that much by a swell without wind seems not to be considered. It is well, however, to consider the contradictory statements of the "Beaver's" witnesses in determining what credit is to be given them, and we will adopt counsel's effective method (brief, pp. 152-153) of enumerating a few of these inconsistencies:

1. *Speed of the "Beaver" at 77 Revolutions in Smooth Water.*

Taking what we were told by appellee (IV, 1469) was the speed of the "Beaver" on her trial trip with 86 revolutions (17.6 knots), the experts testified that her speed at 77 revolutions would be 15.76 knots (D. W. Dickie, II, 363; Heynemann, II, 391; James Dickie, II, 433). Chief Engineer Paul, who was on board at the time, testified that 17.6 knots was in fact her speed on

her trial trip (II, 614). Later Mr. Frey informed us that this was an error and should be 17.06 (II, 719) and, on this changed assumption, Mr. D. W. Dickie said that her speed at 77 revolutions would be 15.27 knots (IV, 1220). It is, therefore, open to doubt whether the rate of *exactly* 15 knots at *exactly* 77 revolutions (“Always it will be noted the significantly chosen numbers” and “Was there ever such perfection of calculation”, appellee’s brief, p. 43), so glibly testified to by some of the “Beaver’s” witnesses, is correct. It looks as if she was capable of *greater* speed.

2. *The “Beaver’s” Speed up to Duxbury and When She Passed Duxbury.*

Kidston says the “Beaver” passed within half a mile of Duxbury, and counsel adds that she was proceeding on “known courses”. Ettershank says that generally the “Beaver” passes Duxbury “about a mile off” (II, 544). Kidston says that the “Beaver’s” speed was reduced by the swell between Red Buoy and Duxbury. Ettershank says that she was *still* making “around 15 knots” (id. 531). He also says that at 2:15 the “Beaver” might have been a little *past* Duxbury (id. 532). In other words, the “Beaver” may have been going faster up to 2:15 P. M. than Kidston thought she was.

3. *The “Beaver’s” Speed in General as Testified to by Her Own Witnesses.*

a. The claimant’s sworn answer to Interrogatory No. 5 in the freight suit alleges that the “Beaver’s” speed

at 3 P. M. under 77 revolutions of her engines was *11 knots*.

b. Captain Kidston, at the hearing before the inspectors, said that her speed was *11 knots* (Kidston, 877).

c. At the same hearing Kidston testified that her full speed was *17 knots* (id.).

d. Chief Engineer Paul, at the same hearing, said that her full speed was *16 knots* (Paul, 639), and that on the day of the collision she was slowed to *13 knots* and was not making more *at any time* on that day (id.).

e. On the trial Kidston testified to a speed of 15 knots cut down to 12 on leaving the Red Buoy.

f. On the trial Chief Engineer Paul testified to the same state of facts as Captain Kidston, but also said that *full speed was 77 revolutions* (Paul, 618).

g. Second Officer Ettershank said on the trial that the "Beaver" was making around 13 knots at the time she reversed her engines, *which was a reduction of her previous speed* (Ettershank, 520-521).

In view of these contradictory statements, some of which led us to so frame our questions to the experts that counsel now says such questions are immaterial, how can *any reliance whatever* be placed on the deductions made as to the "Beaver's" speed.

#### 4. *The Run of 19.6 Knots Claimed to be Shown by the "Beaver's" Log.*

We have already suggested that the testimony as to the setting of the "Beaver's" log at 1:45 P. M. is most

unsatisfactory, because the man who set it was not called as a witness. It is now said that Ettershank's evidence shows that it was set. This witness, however, was on the bridge from the time the steamer was under way until the collision (II, 503), so he could not have seen the log set any more than Captain Kidston could have and it is obvious that he did not see it. We know that it is said to have been *ordered* set at 1:45, but we also know that there were delays in carrying out other orders. Moreover, the log must have overrun 1.6 knots to fix the point of collision where Captain Kidston fixes it. Lopez thinks this would be "the extreme limit" that it could overrun (III, 773). And Ettershank says the log would only overrun on that day half or three-eighths of a mile an hour (II, 514), and that the "Beaver's" run would be about 19 knots and not 18 (II, 533). Quot homines; tot sententiae! It would have been very interesting to have learned how much of a run the log showed on the "Beaver's" return trip to San Francisco, but unfortunately this was never recorded and the explanation of this is far from satisfactory (III, 917-918).

### 5. *The Extraordinary Swell.*

This swell was "a heavy westerly swell" on the "Beaver's" main case (and maybe this is true). It did not, however, become an extraordinary swell "comparable to the worst storms in midwinter" till the pilots took the stand in rebuttal. Pilot Swanson says in the passage from his evidence quoted by counsel that at about 1 P. M. there was "an extraordinary heavy break



on the bar". Third Officer Judson of the "Beaver", going out at about the same time, says: "Well, the bar was breaking *slightly* when we went out" (II, 478). Swanson further says:

"Q. How high did the water come over you?

A. Well, I thought it was 500 feet. I was with my hands up this way, and it filled up and came up to my shoes on top of the bridge. I was in the middle of the ship."

(IV, 1287.)

Note also the evidence of Pilot McCulloch:

"When I entered the North Channel everything there was smooth in the channel, but the west bank was breaking tremendously. It was breaking so that from the inside west bank buoy to North Head was one continuous run of white water, and, gentlemen, I tell you that when those Japanese officers saw that white water ahead of them, and not knowing where I was directing their ship, the ten officers in that turret fixed their eyes on me to see whether I was going to quiver in taking that ship through or no. There was a continuous line of white water from the west bank to the North Head, without a break at all, and I, knowing that there was sufficient water there, took their ship through."

(IV, 1292-1293.)

When we contrast this grossly exaggerated evidence with the testimony of the "Beaver's" officers, who certainly went as far as they could, we do not think that it should be taken quite literally.

Captain Kidston says that the swell was a *long smooth one* (III, 870). Chief Engineer Paul, however, says that it was "a heavy sea" as distinguished from a swell (II, 608, 613), and that there were whitecaps and "good long

caps at that" (II, 613). Broadbuss, the wireless operator, when asked if there was much sea on, says: "There could not have been much sea on—there was no wind" (IV, 1112).

That the maregraph referred to by counsel showed unusual disturbances at that particular period is undoubted, but how far these disturbances affected the "Beaver's" run can only be guessed at in view of the unreliable and inconsistent testimony given on her behalf.

When we contrast all of the foregoing evidence with that of Captain Lie and the "Selja's" officers, we submit that the story of the latter does not suffer from the comparison, and that it is more reliable as regards the point of collision. It is true that Captain Lie could not take exact bearings of Point Reyes, as Captain Kidston claims to have done, but the reliability of these latter bearings, taken after the excitement of a fearful collision, with the fog lifting and shutting down, may be seriously questioned.

Counsel also refers to certain evidence of the expert, James Dickie, to the effect that the "Beaver's" speed might have been retarded seven-eighths of a knot. It will be noted, however, that the witness considered this a very liberal allowance and that the speed would probably be retarded less. The witness' views as to the effect of a swell without wind are most interestingly stated on pages 1049 to 1060 of one of his many cross-examinations. We also quote the following testimony as fully explaining his attitude:

“Q. In Mr. Denman’s examination of you, you said that a large swell would affect the speed of a ship; you were not further cross-examined on that particular statement. What do you mean by that? To what extent would that affect the speed of a ship?

A. If you give me the height of the swell I think I could answer it pretty closely on the ‘Beaver’ case.

Q. Let us get down to something practical. You know the North Channel here?

A. Yes.

Q. You have passed through it?

A. Yes.

Q. Do you know what is called the Potato Patch?

A. Yes.

Q. Let us assume that the ‘Beaver’ is passing through the North Channel at a speed of 15 knots per hour that there is a swell breaking over the Potato Patch westerly, and she directs her course after she leaves the North Channel into this swell in a westerly direction; to what extent would that, in your opinion, affect the 15-knot speed of the ‘Beaver’?

A. I don’t know because one thing has no connection with the other whatever. How much water is on the Potato Patch?

Captain KIDSTON. 4 fathoms.

The WITNESS. That is 24 feet.

Mr. DENMAN. And let me add this suggestion, it is breaking 4 breakers on the Potato Patch before it gets across into the North Channel.

A. That would not be a very big sea when it would break. I think about a 7-foot sea would break on the Potato Patch—6½ feet or 7 feet. I am talking of the sea in the North Channel. I think about 6 or 7 feet would break on the Potato Patch.

Mr. McCLANAHAN. Q. I am simply stating to you that it is breaking on the Potato Patch in order to give you some idea of the swell. A. I am try-

ing to get the height of the sea. I could figure it out but I could not figure it sitting here.

Q. Would such a swell affect the speed of the 'Beaver' after she left the North Channel to the extent of retarding her speed 3 knots per hour?

A. No.

Q. You said there were certain sea conditions that would affect the speed of the 'Beaver'?

A. Yes.

Q. What are those sea conditions?

A. A gale of wind, a heavy sea.

Q. By a heavy sea do you mean one accompanied with wind?

A. One accompanied with wind.

Q. Would a smooth swell affect the speed of the 'Beaver' materially? A. Slightly, but not much.

Q. Have you had any experience in that matter?

A. Yes.

Q. Please state what it is.

A. When I crossed on the 'Siberia' we had wind. It was put at about 24 miles an hour, and we had, as near as I could measure it passing along the ship's side, about 7 feet 9 inches of sea. The stern was going up and down 24 feet and 3 inches, as near as I could measure it, and it was measured very closely, and the speed, according to the day's run, was only twenty-three one hundredths of a knot reduced from the day before and the day after.

Q. How was she headed with reference to this wind and sea?

A. I don't recollect now. I have the direction but I don't recollect it.

Q. Was it a following sea?

A. No, I think it was a head sea.

Q. Have you ever had any experience on the Atlantic Ocean?

A. Yes.

Q. Please state it.



A. I measured the 'Majestic' one time. Her stem was going up and down 61 feet. She had an ordinary speed of 20 knots and she was reduced that day to  $18\frac{3}{4}$  knots.

Q. Was there any wind blowing?

A. A gale wind, a heavy gale wind.

Q. That was one and  $\frac{3}{4}$  knots in the whole day's run?

A. No, one knot and a quarter per hour average for the day. She was a pretty long ship—she was 560 feet.

(James Dickie, 1099-1102.)

We think counsel goes too far when he says on page 149 of his brief, "We now see *why* Lie found the two Danish fishermen", etc. It was *not* necessary to call these witnesses on any theory that Lie's calculations did not fit, if the swell was admittedly heavy, for our experts had already testified that the "Beaver's" speed would not be materially retarded by a swell without any wind. The fishermen, moreover, were called mainly to show the reckless navigation of the "Beaver" on that day and only incidentally testified as to the weather. We think that our client has been rather roughly handled on this score.

As regards our claim that the "Beaver's" speed *through* the water was fifteen knots, we still assert it. Whether such speed is affected by a current or a swell would seem to make no difference. She is making fifteen knots through the water in the one case as well as the other, while she is proceeding in the water. The only reason we can see for the proposed distinction is that in the case of *The Yarmouth*, 100 Fed. 667, 672,

cited by us, the retardation was due to a current and not a swell.

Counsel says that Captain Lie's course of S. 65° E. would take him considerably to the south of the light-ship off the Golden Gate and would be an absurd course. As the captain says, however, he simply went to his chart and drew his course, that he knew said course would not lead him into temptation before he had time to go in again, and that he just shaped the course and would have gone in and checked it up again (IV, 1167). He thought it was a course going close to the light-ship at the time and admitted his mistake in this respect at the trial. Other people also make mistakes as to courses. Captain Kidston testified before the inspectors that in a straight line his vessel would be a mile and a half off Point Reyes when passing it (III, 830), which is *very close* to the distance at which Lie thought he passed it. Kidston, however, changed this testimony to 2½ miles at the trial (III, 831).

We have perhaps already said too much, however, as to this very immaterial point. Libellant's evidence as to the point of collision was put on solely to show that the "Beaver's" speed was greater than 11 knots, the rate admitted by her. Her speed, however, was excessive in any event. And even if the point of collision is nearer to that fixed by Captain Kidston, it is a matter of no great moment. It would simply show that Captain Lie judged the bearings of Point Reyes *wrongly* and was further on his course than he thought. There is nothing remarkable about this if counsel's contentions as to the difficulty of locating sounds in a fog have

any merit, for he even cites cases where whistles are heard on the port side of a vessel and come up on the starboard side (brief, p. 38). The testimony as to the point of collision, however, in no way tends to show that the "Selja" was at a standstill. It is simply again resorting "*to an involved state of affairs and consequent uncertainties which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel*".

We will close this subject by a brief reference to Captain Lie's testimony on *one* of his cross-examinations:

"Q. Don't you think the course you were sailing on had anything to do with the collision?

A. I don't think so.

Q. And you don't think the distance that the vessel traveled after she left Pt. Reyes has anything to do with it?

A. I don't think so.

Q. And you don't think the point of collision has anything to do with the case?

A. No, I don't think it has anything specially to do with it except that my vessel was there, that is all. I wanted to show that my vessel was there—it was for nothing else."

(IV, 1188.)

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## V.

### Evidence of the Experts (appellee's brief, pp. 155-159).

Counsel now asserts that the questions to these experts are not warranted by the evidence. He should remember, however, that they were warranted by the

evidence when they were asked. The facts in regard to the "Beaver's" speed as proved at the trial turned out to be quite different from those given out by appellee before the trial. All of the hypothetical questions are helpful, however, and can easily be adjusted to the changed conditions.

Counsel has picked out the evidence of the expert Heynemann to illustrate the questions asked. We suppose that the reason for this is that he was not quite so sure of his ground as the other two experts, but we will let that pass.

It is true that in inquiring about the "Beaver's" speed after she left the heads we did not in the first instance consider retarding sea conditions. We did not then know that there were any such retarding conditions, and the cross-examination of the experts certainly indicates that there was no great retardation. We establish the vessel's natural speed and it seems to us that it was for the claimant and not for us to show why it should be cut down.

As to the criticism of the questions based on 84 revolutions of the "Beaver's" engines, we submit that it was proper to inquire as to this as well as 77 revolutions, since 84 was the maximum number. As regards the questions containing the element of 13.572 knots instead of 15 knots at 77 revolutions, we would say that the wrong element was based on conditions as then given us by the appellee. It was clearly shown by the experts that those conditions did not fit the facts of the case. So also as to the questions based on a speed of



11 knots, the exact number given to us by the appellee before the trial.

Counsel on page 156 of his brief makes the assertion that our experts admitted that the "Beaver" would be turning to starboard "under the conditions as they actually were". We do not admit this, however. Admitting that she *would* be swinging to starboard under conditions testified to at the trial by Captain Kidston she could *not* be swinging to starboard under the conditions shown in Captain Kidston's report to the inspectors, on which report our hypothetical questions on this subject were based. Said report, as already pointed out, is also borne out by the evidence of the man at the wheel.

As regards all questions based on the ability of the "Selja" to stop in a given time, these are based on facts clearly proved to be correct. If, as counsel repeatedly claims, there was a *following sea* to help the "Selja" on and which did help her on, then it follows that it would have taken a *longer* time to stop her instead of a *shorter* time. Counsel in this part of his argument overlooks the fact that the conditions which would cut down the "Beaver's" speed would *increase* the "Selja's". In one breath counsel tells us that the following sea helped to bring the "Selja" to the point of collision as located by Captain Kidston, while in another he refers to it as *cutting down* her speed (brief, p. 157).

Counsel also says that there is no relevance to the testimony that the "Selja" going at six knots or three knots would have stopped in a certain time, in that she

did not reverse till she had been at a standstill for some minutes. This assumes the very fact in issue in this case. We again repeat that if the "Selja" was going at 6 knots until 3:05, and then reduced to 3 knots, and then stopped her engines at 3:10, it would have been impossible for her to come to a standstill without reversing before the "Beaver" was sighted (see our main brief, pp. 44-45). It is all very well, as already pointed out, to say that our evidence on this point is "based on formulae made up from the launching pool", but the fact remains that no witness was called to contradict the evidence. It may be that *at the very end* of the stopping period the vessel is almost at rest, and there is nothing so very absurd in saying that she would only move seven feet in the last minute and forty seconds. The point is that the "Selja" had not at 3:15 reached anywhere near the last minute and forty seconds, and she was clearly not at a standstill at that time. We might add that this evidence also explains the difference of opinion between Captain Lie and the experts as to when the "Selja" would be stopped, if there can be said to be any such difference.

We do not view counsel's deductions from Mr. Heynemann's evidence as to the cause of the scratches on the "Beaver's" bow (appellee's brief, p. 158), as he does. All Heynemann says is that, if the "Beaver" struck the "Selja" at right angles, *then* the scratches on her bows would have to be attributed to the "Selja's" stern movement. The evidence as to these so-called "scratches" (Cf. Stewart, I, 138), however, is potent to show that the vessels did not strike at

exactly right angles, and is strongly confirmatory of Captain Lie's testimony.

We believe that all other points made in regard to the testimony of the experts have already been covered.

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We think that we have now fully answered appellee's brief, although we have not attempted to take up all of the great mass of detail therein contained. In closing, however, we wish to make one further contention as regards Article 15 and feel that it is appropriate to do so in view of the fact that the burden is upon appellee to establish a violation of this rule, and it has been accorded an opportunity to reply to us.

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## VI.

### **It Is Doubtful Whether Article 15 Applies to a Stoppage Such as That Contended for in This Case and in Any Event the Alleged Violation of Said Article Did Not Contribute to the Collision.**

It is noteworthy that counsel, in his very lengthy and involved discussion of this subject, does not present a single decided case on the violation of this rule, and we do not believe that there is any such case in the books. If this be true, it is a strong argument to the effect that the rule is not applicable to a momentary stoppage such as that alleged in this case (see *Campbell v. Hackfeld*, 125 Fed. 696 at p. 697). We have examined the cases as carefully as we can, and we can find none in

which a violation of this rule is invoked. And yet, under Article 16 itself, numberless cases must have arisen where a vessel stopped her engines and came to rest for a short period. We submit that if, after all the years Article 15 has been in force, no cases can be cited thereunder, it is difficult indeed to see how the "Selja" can be held in fault for being at a standstill for a brief moment. Although we believe that we have clearly shown that the rule was not violated because never applicable, we still earnestly submit this additional argument in case the court should disagree with us.

We also earnestly submit that the "Selja's" alleged violation of the rule, even if established, did not contribute to the collision. The uncertainty as to the course Captain Kidston would have pursued had he heard two whistles is well illustrated by counsel's statement as to what he would have done, and the captain's own varying statements given before the inspectors and at the trial. Counsel says he would simply have put his wheel over to port and thus have cleared the "Selja" (appellee's brief, p. 97). Captain Kidston, before the inspectors, says, "I would have kept my course. I would probably slow down and proceed cautiously *but would not have stopped and backed*" (III, 913). On the trial he says, "I probably would have *slowed and stopped* until I located what position she was in" (id.). Counsel delights in parading inconsistencies in Lie's testimony, whereas we have not even begun to attempt to point out the inconsistencies in Kidston's evidence, of which the foregoing is a sample.



As a matter of fact Kidston had no idea where the "Selja" was, and we do not believe that anyone can read the record and come to the conclusion that he would have adopted a different course on hearing two whistles. His *duty*, on hearing either signal, would have been plain, namely: to stop and reverse and not to change his helm. It, therefore, cannot possibly be said that this fault of the "Selja" has anything at all to do with the collision. And, if our argument under Rule 16 to the effect that only *proximate* causes of the collision are to be considered be sound, it is very apparent that said fault was not such proximate cause, but at most a cause "sine qua non". We do not believe, however, that it was even the latter.

We would further again point out that, under the cases cited in our opening brief, if there is a *doubt* as to whether Rule 15 was applicable, *that doubt must be resolved in favor of the "Selja"*. In view of the intricacies of the argument for the "Beaver" on this point, and the mazes through which counsel would have the court wander to establish a fault on the part of the "Selja" in this connection, in view of the inconsistencies developed in the testimony for appellee, in view of the clear and straightforward story told by the "Selja's" officers, and in view of the expert testimony—*how can it possibly be said that at least a doubt has not been raised?* Is the court to enmesh itself in a discussion as to the angle of approach of the two vessels, and the point where they collided, based on mere theory and conjecture, *when it can lay its hand upon a clear fault sufficient in itself to account for the collision?* We

submit not. We submit that the "Selja" has clearly established that it did not in fact violate Rule 15, and we further submit that, even if this is not clearly established, it is certainly *not* clearly established that she did violate it. And if only this latter premise be true, it is apparent that the "Selja" cannot be found in fault.

Dated, San Francisco,

March 24, 1914.

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*



No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship  
"Selja", on behalf of himself and the owners,  
officers and crew of said steamship,

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAM-  
SHIP COMPANY, claimant of the American  
steamship "Beaver",

*Appellee.*

## APPELLEE'S REPLY BRIEF.

WILLIAM DENMAN,  
IRA A. CAMPBELL,  
*Proctors for Appellee.*

MCCUTCHEEN, OLNEY & WILLARD,  
DENMAN AND ARNOLD,  
*Advocates.*

Filed this ..... day of May, 1914.

**FILED**

FRANK D. MONCKTON, Clerk.

By ..... MAY 26 1914 ..... Deputy Clerk.







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OLAF LIE, master of the Norwegian steamship  
“Selja”, on behalf of himself and the owners,  
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*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAM-  
SHIP COMPANY, claimant of the American  
steamship “Beaver”,

*Appellee.*

## APPELLEE’S REPLY BRIEF.

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Counsel for the Selja in their briefs admit that after the Beaver came within the statutory danger zone as indicated by hearing her approaching one blast fog signal, the Selja failed to obey the specific mandate of Article Sixteen no less than nine times, by failing to stop her engines on any of the first nine whistles from the Beaver. They also admit that if the specific mandate of the statute had been followed



there would have been no collision.\* But they urge that the Selja may be freed from the liability for the collision to which her violation of the rule contributed as a *causa sine qua non*, unless claimant further shows it was the proximate cause.

In other words they contend that the same rule of causation applies whether the Selja's captain was subject to the mandate of the statute to do a specific thing, which mandate he disobeyed, or was given a discretion as to what he should do either by statute or the general maritime law. As no clearer case could be imagined for the application of the "but for" or *sine qua non* rule for vessels manoeuvring in a fog, to win their appeal the Selja's counsel must show that this rule no longer applies to collisions in a fog. In further support of this they claim that by virtue of a statute it no longer exists in England.

They still attempt to maintain in their last brief, as a sort of second line of defense, that the *sine qua non* rule applies only when the violation of the statute exists at the moment of collision. They say that although the forces initiated by the violation are not spent when the vessels are *in extremis* nevertheless the fact that it was prior in time excuses it, though it was a *contributing*, if not the proximate cause, of the collision.

They further attempt to distinguish the Admiral Schley upon a most extraordinary error as to the facts,

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\* In view of counsels' admissions in their briefs, which in fact first appear in their libel, we are unable to understand their irritation at our suggestion that it is not necessary for the court to read the record on this point.

showing in what desperation the wish fathered the thought, or, rather, the fancy.

They still insist that the admitted fault of the Beaver in some way erases or palliates the admitted facts as to the Selja's violation of rule 16. They do this by fallaciously applying the principle, that where the facts are admitted or proved as to one vessel's fault the facts must be clearly proved as to the other's, *to a case where the facts as to their fault in this regard are admitted in their own pleadings and by their own captain.*

They still urge on the court those cases of violation of statutory regulations which the opposing vessel knew of and had the time to avoid, that is, what are known as the "last fair chance" decisions, as overruling *The Pennsylvania sine qua non* rule where the opposing vessel knew nothing of the other's faults and hence could not avoid them.

We give brief further consideration to these arguments and also show the weakness of their attempt to break down our case under rule 15.

## I.

**The Umbria decision does not affect The Pennsylvania rule as restated less than three years before in *The Martello v. The Willey*. The law controlling the Umbria-Iberia collision, unlike that in *The Pennsylvania* and the case at bar, did not impose any specific duty on the captain of the Iberia, but left it to his discretion, whether he would slacken his speed or stop or reverse.**

Our opponent admits that there is a difference between the old rule, 18, controlling in the case of *The Umbria*, and the new rule 16, controlling the navigation of the *Selja*, and then fallaciously proceeds to argue as if the difference did not exist.

Under the old rule it is provided:

18. "A steamship approaching another so as to involve risk of collision shall slacken her speed or stop and reverse, if necessary."

That is to say, if a captain, steaming in a fog, hears a whistle forward of his beam, he must determine whether the necessities require one of three things, slowing, stopping his engine, or reversing. He has a discretion and must make a judgment involving several considerations, the density of the fog, the condition of the sea and the wind, the speed of his own vessel, the usual course of opposing vessels, and various other things. Manifestly the propriety of his conduct, of his exercise of this discretion, must be determined by considering the evidence he had before him as he stood on the bridge, not by looking backward after the event,

and declaring fault from a result based on factors of which he had no knowledge. The law compels him to exercise the discretion and he cannot be blamed if, after he properly exercises it in view of what he knew on the bridge, the event is unfortunate. As in any other case where a discretion is allowed, there must be fault in its exercise, and the fault must be the proximate cause of the collision, before his ship becomes liable.

We therefore find the Supreme Court saying, in the case of *The Umbria*, where the captain had exercised this discretion and had not stopped:

“It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was, she would have passed the point of intersection before the *Umbria* reached it. Manifestly this is not the proper test. The propriety of certain manoeuvres cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their manoeuvres must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no manoeuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.”

*Umbria*, 166 U. S. 412 at 420.



Of course the "propriety of the Iberia's movements" judging the captain's exercise of his discretion as he looked forward from his bridge, "cannot be determined by the chance that the two vessels may or may not reach the point of intersection" as this would clearly not determine whether his movement was either a fault or, if a fault, whether it was the proximate cause of the injury.

In the case at bar, however, the statute prescribes the exact duty. The vessel's engines must be stopped as soon as the whistle is heard forward of the beam. The captain has no discretion and there can be no question as to whether he is in fault. The failure to obey the specific mandate of the statute is itself the fault and this was confessed in the *Selja's* libel.

Now when such a specific mandate of the statute is violated, the case clearly falls under *The Pennsylvania* rule, as interpreted in *The Martello v. The Willey*, 153 U. S. 64, decided by the Supreme Court less than three years before *The Umbria*. In that case the Willey, a ship, violated the specific statutory requirement that she should blow a mechanical horn in the fog. Instead she blew an ordinary tin horn. After citing *The Pennsylvania* case, it quotes the following from one of the leading English authorities as being identical in effect with *The Pennsylvania* case:

"To the same effect are \* \* \* *The Fanny M. Carvill*, L. R., 13 App. Cas. 455, in which the Court of Appeals observed that 'if you can show that there is a defect in the lights, that vessel must be held to blame, unless she can show that the defect which exists in her lights could not by any possibility

have contributed to the collision.' See also *The Duke of Buccleugh*, 15 Prob. Div. 86 (1891) App. Cas. 310."

*The Martello v. Willey*, 153 U. S. 64, at 74-75.

Having thus identified *The Pennsylvania* case with the British law, the court goes on to restate the rule with reference to the facts before it, as follows:

"Can it be said in this case that the absence of a mechanical fog horn could not by any possibility have contributed to the collision?"

*Id.*, p. 75.

Mr. Justice Brown wrote both *The Martello v. Willey* and *The Umbria* opinions. Although he cites *The Martello* in *The Umbria*, on the question of reasonable speed in the fog, he does not mention *The Pennsylvania* rule of liability he had so elaborately considered and stated in that case within three years previously. And yet our opponent insists that by *The Umbria* decision the Supreme Court abolished *The Pennsylvania* rule, and that now in each case the question to be asked by the court is whether the violation of the specific statutory mandate was the proximate cause of the collision. The contention that Justice Brown either consciously or unconsciously reversed *The Martello*, is to accuse the most brilliant admiralty judge in the recent history of the American bench of either mental incompetency or intellectual dishonesty.

It must be obvious that the remarks quoted from *The Umbria* apply only to those manoeuvres which are not ordered by the statute and that as to those speci-

fically prescribed Judge Brown's statement of the rule in *The Martello* still controls.\*

If then, the question is not one of *causa proxima* but merely of a *causa sine qua non*, that is, whether the violater of the specific mandate can show that his violation "could not by any possibility have contributed to the collision" the question of the offender's reaching the point of intersection of the two courses becomes of vital importance. If the admitted violation of the rule brought him to the point of intersection when he would not have reached it otherwise, it was a *causa sine qua non* of the collision, and the question of proximate causation becomes immaterial.

Now this is exactly the method in which the court applied *The Pennsylvania* rule in *The Admiral Schley*, *The Georgic* and the English rule in *The Britannia* (see appellee's opening brief, pp. 10-20).

*The Britannia*, as we have pointed out, uses the very language of Judge Brown in *The Martello v. Willey*, supra, viz.:

"But the rules have been dealt with over and over again and before one can acquit them of the blame one must see that the non-stopping could by no possibility have contributed to the collision. In this case, if the *Britannia* had stopped her engines in the first instance, her progress would have been stopped and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."

*The Britannia*, 10 Asp. Maritime Cases 65, at 68.

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\* As the case of *Prince v. Eastern Steamship Company*, 100 Me. 395, 84 Atl. 894, subsequently cited by our opponents, does not even mention *The Martello v. The Willey*, its consideration of the "but for" theory need not receive our consideration.

It is therefore submitted that unless the court would overrule the law as laid down by Judge Brown in *The Martello v. Willey*, and in these subsequent cases, Judge Bean's decree must be sustained. Certainly nothing in *The Umbria* will justify such a course.

Captain Lie operated under old rule 18. Instead of stopping his engines at once, he first kept his speed and then slowed, then stopped and then reversed. To hold his action proper and free him from liability for the dangerous position into which he steamed in violation of new rule 16, is virtually to repeal that rule. It is to say that despite the specific mandate you may still exercise your discretion, and if it is a discretion which you could have properly exercised under the repealed rule, you shall not be liable despite the fact that if you had obeyed the new law the collision would not have occurred.

Such a holding would at once break down all mandatory force of the rules of the road. Every violation of the passing signals would then be open to the question, was it not a proper exercise of discretion? It would bring confusion to the mind of every navigator, who must then control his own vessel, not on the theory that the opposing vessel must obey the rules, but with all the uncertainty of anticipation of a claim by his opponent, that he had a discretionary right to do anything that seemed, from his bridge, to be good navigation!



## II.

### The English Amendment of 1911 of the "but for" rule.

We are unable to follow counsel's argument regarding the repeal in 1911, by act of Parliament, of the *sine qua non* rule as to violations of a specific statutory mandate, even granting that the English courts will treat the repeal as entirely abolishing the presumption, which we doubt. His theory seems to be that because the *sine qua non* rule in Great Britain rested on statute and was repealed by statute, the British repealing act *ipso facto* set aside the general admiralty law of the United States as embodied finally in *The Martello v. Willey*. We do not admit such a wide jurisdiction of the British legislature.

Because the effect of the repeal in Great Britain makes "any enquiry as to whether a breach of a regulation *might possibly* have contributed to a collision henceforth irrelevant", is no reason to disregard the Supreme Court's rule in *The Martello v. Willey*, which requires that on violating the specific command of the statute it must be shown that the "violation could not by any possibility have contributed to the collision".

The deeper fallacy of counsel's argument becomes apparent when we consider the fact that the Pennsylvania-Troop collision occurred in June, 1869, several years before the English statute was passed, when, in the absence of statute, the British rule was the same as that laid down in *The Pennsylvania*.

"In this case [The Pennsylvania] a barque was condemned for ringing a bell as a fog signal while

under way, although in a case arising out of the same collision the Judicial Committee of the Privy Council held that, inasmuch as it appeared that the fog horn would not have been heard a sufficient distance to have enabled the steamer to avoid the danger, the barque should not be condemned for a technical failure to comply with the statute. 3 Mar. L. Cas. 477, 23 L. T. 55. *In other words, both courts proceeded upon the same legal principle; but in the English court the evidence was considered sufficient to show that the sounding of a bell instead of a fog horn could not have contributed to the collision."*

*The Martello v. Willey*, 153 U. S. 64, at 74;

*The Pennsylvania*, 22 L. Ed. 151, 19 Wall. 125.

Surely *The Pennsylvania* rule, if it agreed with the British law prior to the statute, is not to be deemed set aside simply because a subsequent statute has been repealed. In giving the history of the rule in America, Judge Brown, in *The Martello*, does not mention the British statute. Nor does he treat the American rule as resting on the British admiralty law. He simply points out the identity of the two in the absence of statute.

## III.

**The Congressional Act itself fixes the danger zone within which rule 16 is mandatory. It is a matter of indifference whether the Selja was moving ahead or astern, it appearing that her length was across the course of the Beaver, and that she would have been several thousand feet away if she had stopped her engines on hearing even the fifth of the Beaver's whistles.**

There are limits, of course, to which the *sine qua non* rule cannot be carried. If a violation of the rule as to the blowing of a single blast fog signal had occurred half an hour before the collision, when the whistles could not have been heard by the opposing steamer, it is of course manifest that the violation did not contribute.

No better illustration of the boundary of the doctrine could be found, than the motor car case, *Berry v. Sugar Notch Borough*, 191 Pa. State 345, 43 Atlantic 240, cited in our opponent's last brief. In that case the motor was proceeding in excess of the rate of speed permitted by the ordinance and it brought the car under a certain tree at the very moment the wind blew it down. Here of course there was no statutory relationship between the speed of the motor car and the falling of the tree. It was not a case of running into a tree already down. The city legislators were not making a law to avoid trees falling from above. Whereas in the case at bar the rule applies only *when the captain becomes conscious of the fact that there is a*

vessel before him by hearing her whistle. The rule is initiated only by the consciousness of the presence of the other vessel and itself sets the boundary of its application.

All that Judge Bean, in the court below, and these other decisions hold is that Congress intended that, once the vessels come close enough to hear the whistles of a neighboring vessel in fog—that is, that they are within the “zone of danger of collision”, then *The Pennsylvania* “but for” rule applies when a specific mandate is violated.

Counsel’s reiteration that his vessel was going astern across our bows gains him nothing if the rule applied by all these judges applies here. The *Selja*’s struggles *in extremis* to go astern, did not in fact take her away from the *Beaver*’s course. She was still there and there only because of an act which violated the statute.

Even if we apply the ordinary rule of causation where there is no specific statutory mandate, it is immaterial whether the vessel is going ahead or astern at the moment of impact. She may very well have put on her full power ahead to escape at the last moment—a manoeuver which the courts have always excused. Whichever rule of causation we apply, the slow movement of the *Selja*, one way or the other, becomes immaterial so far as the violation of Article 16 is concerned.

Counsel still urge that unless the violation of the statutory mandate occur at the moment of impact, *The Pennsylvania* rule does not apply. They ignore



the words of that decision itself, defining what the "time of the collision" and "contributing to the collision" mean. Both of these phrases occur in the same paragraph of the opinion, which further defines them as covering a fault "which in *any degree* was the cause of the vessels coming into a dangerous position".

*The Pennsylvania*, 19 Wall. 136.

Here is no question of proximate causation but mere contribution, through acts some time previous which initiated forces which bring about the "dangerous position".

In the case of the *Hawgood Co. v. Mesaba SS. Co.*, 166 Fed. 697, the Circuit Court of Appeals for the Sixth Circuit applied the rule to a violation of statute concerning signals occurring when the vessels were a mile apart, holding that this was within the "time of the collision".

"But it is urged on the part of each vessel that the violations of the rules of navigation so appearing on her part could not have contributed to the collision. The fact that a ship was at the time of collision in actual violation of a statutory rule designed to prevent collisions throws the burden upon her to show that such violation could not have contributed to the collision. *The Pennsylvania*, 19 Wall. 125, 126, 22 L. Ed. 148; *The Martello*, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Ellis*, 152 Fed. 981, 82 C. C. A. 112. Not only can it not be said in the case of either of these vessels that *but for* her violation of the rules the collision would have occurred solely on account of the fault of the other vessel, but it would seem reasonably probable that, had either vessel observed the duties

which we find to have been violated, the collision would not have occurred."

*Hawgood Transit Co. v. Mesaba SS. Co.*,  
(C. C. A.) 166 Fed. 697, at 702.

Our opponents have also made no answer to our point that the violation of the passing signal regulation brings the offender under the *Pennsylvania* rule and yet the passing signals must be given long before the collision. There are no passing signals for vessels *in extremis*. Nor have they answered the suggestion that under their construction, the *Pennsylvania* rule would not apply to a vessel lying at sea with no way on her, and blowing no two blast signals as required by rule 15, till the approaching vessel was within a minute off and then blowing two blasts and another two blasts at the moment of impact. She would not be in violation of the rule, under their construction, because obeying it *at the time of the collision*. Could any result be more absurd?

It is not astonishing that the reply brief while reiterating their proposition, does not attempt to answer these examples showing its unreasonableness.

## IV.

**Counsel's extraordinary error as to The Admiral Schley.**

The final decision of *The Admiral Schley*, 142 Fed. 64, at 67, by the Circuit Court of Appeals of the First Circuit, is, we think, conclusive authority for our contention. Counsel recognize its force and strain every effort to distinguish it. That this can be done only by a complete misunderstanding of the facts is significant of its real impregnability.

In that case, as with the *Selja*, the Admiral Schley failed to stop her engines "when she heard the *first faint* whistle from the Meyer". The court applied *The Pennsylvania* rule, saying, "except for" the violation of rule 16 "there would have been no occasion for the litigation".

Counsel comment on this as follows:

"The case at bar is entirely different from that of the Schley with her 2000 foot tow" \* \* \* "that was a case of a vessel with a tow over 2000 feet long loitering in the path of navigation and constituting an obstruction thereto", etc.

Now the fact is that the Schley was steaming without a tow. It was her failure to stop her engines that placed her across the bows of the tug Meyer who had the 2000 foot tow. It was the Schley, like the *Selja*, whose violation of the statute "was in some degree the cause of the vessels coming into that dangerous position".

Counsel's position with reference to *The Schley* case is the harder to understand in view of the fact that both vessels were held in fault for violation of rule 16 under the reasoning of *The Pennsylvania* case, 142 Fed. 67. We can find nothing in the facts to support the idea that both vessels had long tows and hence that the decision cannot be held to have passed squarely on rule 16.

As we have pointed out, the portion of *The Pennsylvania* decision on which the Circuit Court of Appeals then relies, is that applying the "but for" rule to a violation of the specific mandate of the statute which "in any degree is the cause of the vessels coming into a dangerous position" (19 Wall. 136).

It was the coming into the dangerous position before the bows of the Meyer, not the fact that the Schley was going ahead or astern when they came together, that was the cause of the collision. So also with the Selja lying nearly at right angles across the bows of the Beaver at the moment of impact. The analogy is complete, and the decision as to liability should be the same.



## V.

**The opinion in *The Belgian King* nowhere considers the portion of rule 16 involved in this case—that is, requiring stopping the engines. It holds that the passing rules and not the stop engine rule applied to the *Tellus*. The two rules are mutually exclusive. As the former was applied the latter could not have been considered.**

Our opponent's final brief takes no notice of the contention concerning *The Belgian King*, 125 Fed. 869, 876, brought out at the hearing of the appeal, a contention which conclusively disposes of that case as an authority in the case at bar. On the contrary, they draw an inference from the reporter's headnotes not in the slightest way warranted by the opinion.

The fact is that the second half of rule 16, that is the stop engine part, is nowhere considered in the opinion.

After stating the facts the Court of Appeals, on page 875, sets forth the rules it believes involved in the case. They are rule 16, controlling in fogs, and rule 18, of the steering and sailing rules. In the next paragraph, ending on page 876, the court considers the first half of rule 16, requiring moderate speed, and finds *The Belgian King* violated it.

In the next paragraph, page 876, the court *excludes the consideration of the stop engine portion of rule 16* by finding that the positions of the vessels were so ascertainable that the *passing rules*, and particularly

rule 18, came into effect. The language of Judge Morrow is as follows:

“The next inquiry relates to the interpretation of signals given by the respective steamers, and the manoeuvres of the vessels upon those signals. When the whistle of the *Belgian King* was first heard, the position was sufficiently ascertainable by the *Tellus* to permit her to continue on her course at slow speed, *and give the direction signal that she was going to starboard*. Not receiving a *proper response to that signal*, the engines were stopped and the signal repeated, the ship drifting for some minutes before the collision.”

*The Belgian King*, 125 Fed. 869 at 876.

The *Tellus*' right to apply *passing* rule 18 is necessarily exclusive of the obligation to stop engines under rule 16. One cannot be at once exchanging signals for passing and stopping his engines for not passing. The two rules are mutually exclusive.

While we believe that Judge Morrow erred in holding that the *Tellus* was entitled to attempt to pass the other vessel when she was out of sight in the fog, the undeniable fact is that he did so hold and that his opinion is valueless as an interpretation of the stop engine rule.

Surely such a case cannot be authority here where the nine failures after three o'clock to obey the stop engine rule in the fog cannot in the remotest way be connected with the passing rules.

Not only is the stop engine portion of rule 16 not discussed by Judge Morrow, but *The Pennsylvania* rule is not mentioned. We cannot see how the decision of this

court in *The Belgian King* has the slightest bearing on the case at bar.

The same is true of Judge De Haven's decision in the lower court. The court does not even mention the *Tellus'* non-stopping—much less consider it with reference to the latter part of rule 16. Its consideration of the non-stopping as applied to *The Belgian King* is entirely in accord with our contention here.

## VI.

**The rule requiring the fault of one vessel to be clearly made out where the other is admitted or proved, is entirely satisfied as to the Selja's admitted faults.**

Counsel cite a number of cases to prove that where one vessel is shown to have violated a statutory mandate, the proof as to the other vessel's fault must be clearly made out. This, of course, is a mere rule of evidence. It has no application to a case like that at bar, where the facts as to the Selja's violation of rule XVI are admitted by the pleadings and her captain. There has not been the slightest doubt that Captain Lie was charged with knowledge of the fact that he was running towards an approaching steamer during the ten minutes in which he failed to obey the stop engine rule, and that his failure might in some degree contribute to the collision. The only question disputed is a question of law, i. e., does liability for violation of the specific mandate to stop engines flow from its admitted *contribution* to bringing the vessels "into a *dangerous* position" or must it be shown to have been the *proximate cause* thereof.

Now in the cases cited by counsel the question is a disputed fact as to whether contributory negligence existed at all. The chief case cited, a Supreme Court decision, so lays down the rule:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the *evidence* of contributory negligence on the part of the sailing vessel *should be*



*clear and convincing.* Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to *raise a doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

*Alexandre v. Machan*, (The City of New York)  
147 U. S. 72 at 85 (37 L. Ed. 84; 90).

The evidence as to the Selja's failure to follow rule 16 from 3 to 3:10 is as "clear and convincing" as admission of pleading and captain can make it. It is equally clear and convincing that it contributed to bring the vessels into a dangerous position, and that it was a *causa sine qua non* of the collision. This is true beyond a reasonable doubt.

The same rule controls in *The Commonwealth*, 174 Fed. 694, much relied upon by our opponents. The reasoning of the decision there is summed up in the last paragraph of the opinion on page 702:

"There is considerable legitimate criticism of the Volund's navigation but in view of the gross fault of the Commonwealth in proceeding at such a rate of speed, I do not think, under the authorities, that the Volund's *minor faults are clearly enough established* to entitle the Commonwealth to an apportionment of the damages."

*The Commonwealth*, 174 Fed. 694 at 702.

So with *The Lord O'Neill*, 66 Fed. 77, where there was a dispute both as to whether there was a failure to blow a passing signal and as to its contribution,

not as the proximate cause, but whether it "had or probably might have had something to do with the act which produced the injury".

In *The Europe*, 175 Fed. 596, Judge Wolverton lays down *The Pennsylvania* rule as we contend for it. On appeal this court held as a fact that the fault was "harmless".

And so with all the other cases on this point. In no case, either cited by counsel or that we can find, where the vessels are manoeuvring in a fog and hence where the captain of each vessel must steer his ship solely by sound from the other vessel, has a failure to follow the specific mandate of a statutory rule been excused where it clearly contributed to the collision, even though it was not the proximate cause thereof, and even though the fault of the other vessel was admitted.

On the question of the enormity of the Beaver's offense, even were it pertinent, we feel that our opponent has drawn rather a long bow. Captain Kidston was coming out of a bight (897) and wished to round Point Reyes for his next departure. A steady and accustomed rate would bring him there and enable him to change his course with accuracy, and so he kept his speed when the fog suddenly shut down on him about fifteen minutes before the collision. It was a serious fault but not without a reason, a reason not disconnected with the safety of his ship. They would certainly be safer if he could tell where he was in the fog than if he could not. The certainty was un-

doubtedly purchased at too high a price, but the fault was nowhere near so great as in many cases where vessels with a much higher speed have divided damages with their opponents. As to the other alleged faults, the Beaver stopped immediately on the second whistle from the Selja (Kidston, p. 900) and her previous slight change of half a point did not contribute, as it admittedly took her away from the Selja rather than towards her.

## VII.

**The "last fair chance" rule an obvious exception to The Pennsylvania rule. Consideration of cases or error in clear daylight which were held not to contribute because the opposing vessel did not avoid them, with full opportunity to do so.**

We have not discussed the many cases cited by counsel involving the "last fair chance" rule. This rule provides that where, as in the case of negligently approaching another vessel which is on the wrong side of the channel in broad daylight, the approaching vessel does so with its eyes open and with a free chance to avoid its opponent's fault, it cannot claim that fault as a contribution to the collision.

Such cases are:

*Long Island R. v. Killien*, 67 Fed. 365;

*The Lowell M. Palmer*, 142 Fed. 937;

*The Albatross*, 184 Fed. 363;

*Wilhelmosen v. Ludlow*, 79 Fed. 979;

*The Clara*, 55 Fed. 1021;

*The E. A. Packer*, 20 Fed. 327;

*The Maryland*, 19 Fed. 551;

*The Buckeye*, 9 Fed. 666.

In all of them it is held that the fact that the one vessel could manoeuvre with freedom and had such full knowledge of his opponent's fault, if any, that it could have avoided its effects, made that fault innocuous. They can have no application to the case of two vessels in a fog where neither the faults nor whereabouts of one vessel are known to the other till both are *in extremis*.



## VIII.

**Further purpose of rule 16 is to increase the time during which vessels are approaching one another in order that each may better make out the location of the other.**

What the purpose of Congress was in passing the rule has not been shown, but from its provisions it is apparent that one of the great advantages to be gained, is in lengthening the time during which the vessels are approaching. The uncertainty regarding the hearing of fog signals makes it important that as many of these as possible should be heard by the opposing steamer to assist her in locating her opponent.

In the case at bar but two fog signals were heard by the Beaver from the Selja, one just before the vessels came in sight, and hence the first when they were scarcely a minute from *in extremis*.

Can it be said beyond any possibility that, had the Selja obeyed the law and stopped her engines some ten minutes before she did, more of her greater number of whistles due to her greater time in approaching, would not have been heard by the Beaver and the collision avoided? What would have happened had the Beaver heard *more* of the Selja's whistles cannot, of course, be determined. Under *The Pennsylvania* rule, the violation of the stopping mandate must, therefore, be deemed to have been a contributing cause even if not the proximate cause of the collision.

The above suggestion is offered in answer to the argument that the only purpose of the stopping rule

is to enable the vessel hearing another approaching, to come to a standstill. The increased number of whistles to her opponent during her slower approach under the stop engine rule is equally valuable as a preventative of collision.

## IX.

**The Selja's failure to blow two whistles.**

Counsel's attempts to meet our case on this point do not, we feel, impair in the slightest the force of the array of facts set forth in our opening brief. They can be followed only by a careful study of the record, but when so studied our point will be seen to be "clearly" established within the rule of the so-called minor and major fault cases. Referring to the lazy man's rule of *The Kentucky*, 148 Fed. 500, namely, that if the court finds the facts involved it will dodge their analysis, we do not think that this will appeal to this tribunal.

There is nothing involved or uncertain in Engineer Eggen's testimony that she would have been stopped in the water two minutes before the collision. Having this testimony from their engineer, who should have known, it surely was not for us to examine any other witness from the Selja on this point. There is nothing uncertain in the statement of the log that she was nearly at a standstill at 3:10.

Nor is there anything uncertain in Mr. Bulger's testimony. He is an unprejudiced witness. He says that Captain Lie told him they were at a standstill for some time. With such statements from captain and chief engineer and log, the court cannot ignore the many overwhelming corroborating incidents cited in our brief. If the situation is an involved one (and this is a relative term, for all collision cases are that) the complexity is in the fabric of the case itself, which

must be constructed largely from our opponents' witnesses.

Our opponents' method of attack is fairly illustrated by the following few examples: For instance, some of the Beaver's officers place her speed at 15 knots for 77 revolutions under sea conditions. The experts say that she would have a theoretical speed of 15.27. Our officers' testimony is questioned because they omitted the fraction.

Other differences of opinion of the officers as to speed are mentioned but without pointing out the difference between full speed at a trial trip and the variable rates which come within the range of full speed as indicated by the telegraph. The different opinions were based on these different conditions.

Ignoring the fact that the location of the point of collision is exactly fixed by the bearings from Pt. Reyes taken after the fog raised, counsel make much of difference of opinion as to the amount the swell cut down the Beaver's speed. Nothing could have been more suspicious than an agreement on this point. The significant thing is that they agree that it will cut the Beaver's speed down considerably and that she could not have reached the place Lie testified when they collided. Unless the collision was at the point Lie testified to, his whole diagrammatic scheme fails, and with it his contradiction of Mr. Bulger's testimony.

It is interesting that both sides seem entirely satisfied with the character of their witnesses. The Selja's counsel take great comfort in the perfect mosaic of



fact which their officers construct, with its miraculous coincidences, while the Beaver's counsel point with equal confidence to the agreement in substantial matters with the disagreement as to minor detail inevitable where there has been no collusion.

It is submitted that the Selja must be held liable on her pleadings and her captain's admissions for contributing to the collision by violating rule 16; and that on the whole record she should be held liable for violating rule 15 in not blowing two blasts as she lay at a standstill some six miles south of Pt. Reyes Lighthouse.

Respectfully submitted,

WILLIAM DENMAN,

IRA A. CAMPBELL,

*Proctors for Appellee.*

McCUTCHEM, OLNEY & WILLARD,

DENMAN AND ARNOLD,

*Advocates.*

No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship  
“Selja”, on behalf of himself and the owners,  
officers and crew of said steamship,

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAM-  
SHIP COMPANY, claimant of the American  
steamship “Beaver”,

*Appellee.*

## MEMORANDUM

As to a Recent Unreported Decision of the Second Circuit,  
Considering Facts Analogous to Those Here and  
Sustaining the Pennsylvania “but for”  
Rule in Collision Cases.

WILLIAM DENMAN,

IRA A. CAMPBELL,

*Proctors for Appellee.*

**Filed**

Filed this.....AUG - 7 1914.....day of August, 1914.

**F. D. Monckton,** FRANK D. MONCKTON, Clerk.

By.....Clerk. Deputy Clerk.



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## MEMORANDUM

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Sustaining the Pennsylvania “but for”  
Rule in Collision Cases.

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The Circuit Court of Appeals for the Second Circuit has just rendered a decision in a collision case, sustaining the “but for” rule in the Pennsylvania case, in which the facts are so analagous to the case at bar that



it should certainly receive attention in any opinion rendered by this Court. The case is entitled

Yang-Tsze Insurance Ass. v. Furness, Withy & Co., No. 201, Oct. Term, 1913.

The facts in that case are that the steamer Alleghany, proceeding on a southerly course in broad daylight, and for three-quarters of an hour in clear sight of the steamer Pomaron, which was sailing on an easterly course some ten or twelve miles away, failed to see the Pomaron until the vessels were within a mile apart. The Alleghany had no lookout, and the officer on her bridge had gone into the chartroom and was calculating his position during this entire time, that is, for three-quarters of an hour. This extraordinary negligence by the Alleghany was characterized by the Court as follows:

“That the negligence of the Alleghany was inexcusable and even unparalleled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout.”

As with the Beaver, the owners of the Alleghany admitted liability but insisted on a division of damages, on the ground that the approaching Pomaron had violated a statutory rule and must hence be held liable under the principles of the “Pennsylvania” case.

The fault of the Pomaron was of relatively minor import, if there ever was any occasion for applying the so-called major and minor fault rule. It was committed

in broad daylight, when the vessels were a mile apart, and between five and seven minutes before the collision, that is to say, about the same time prior to the collision that the ninth violation of the stop engine rule, while in the fog, was committed by the Selja. The fault of the Pomaron consisted in porting her helm and turning to starboard, away from the approaching Alleghany. The reason for this change and violation of the rule which compels a vessel in the Pomaron's position to keep her course and speed, was that the officer in charge of the Pomaron saw no one on the bridge of the Alleghany and (rightly) concluded that the other vessel was unaware of his presence.

Speaking of the relative intensity of the faults of the two vessels, District Judge Hand says:

“The case is one which shows the necessity for the proposed new rule which will not hold each ship in solido, but will apportion liability according to fault. Had this been open to me, I should have attributed a very small fraction of blame, indeed, to the Pomaron. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision.”

The striking thing here, as far as the facts are concerned, is that the light fault of the Pomaron occurred while the vessels were from five to seven minutes apart, in *broad daylight*, while the statutory violations of the Selja continued nine times and up to six minutes of the

collision *in a dense fog*. The nine faults of the Selja, committed when her captain could not possibly have known where his opponent was, certainly constitute a vastly graver offense than the one fault of the Pomaron, which had at least some semblance of an excuse. In both cases the forces arising out of the violation of the rule continued till the vessels were in extremis, the Selja at right angles square across the course of the Beaver, the Pomaron turning into the side of the <sup>Allegheny</sup> ~~Pennsylvania~~.

Physically the offenses were exactly opposite in effect. If the Pomaron had obeyed the rule and kept her course and speed, she would have *passed by* the point of intersection of the two courses *before* the Allegheny reached it. If the Selja had obeyed the rule and stopped her engines, she would have taken a longer time in approaching the Beaver (during which time the Beaver might have heard more of her whistles), and she would not have reached the point of intersection till *after* the Beaver reached it. In both cases the violation of the statute was the *causa sine qua non* of the collision.

The Circuit Court of Appeals affirms Judge Hand's decision. It holds that the Pomaron violated rule 21, requiring her to keep her course and speed, in thus porting her helm between five and seven minutes before the collision.

It then resolves the question whether this violation of the rule contributed to the collision and cites the rule in the Pennsylvania case, which we have relied upon in our briefs, and as subsequently reaffirmed in *Belden v. Chase*, 150 U. S. 674. The Court of Appeals say:

“The principle thus laid down that when a ship at the time of the collision is acting in violation of a statutory rule the burden is on her to show not merely that her fault might not have been one of the causes, or that it probably was not, but *that it could not have been one of the causes of the collision, has been reaffirmed in subsequent cases and is the law beyond all controversy.*”

Having thus recognized the rule, the Court proceeds to apply it exactly in the way that we have applied it in the opening pages of our brief. That is to say, it first states the problem for the particular case in the terms of the “but for” rule:

“But whether the collision would or would not have occurred if the Pomaron had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the Alleghany from the Pomaron at the time.”

The Court does not say, Was the failure of the Pomaron to keep her course and speed the *proximate cause* of the collision? but, Would or would not the collision have occurred but for the failure of the Pomaron to hold her course and speed?

In determining whether the collision would or would not have occurred, it applies the principle illustrated in the diagram on page 9 of our larger green brief; that is to say, the Court says, after reviewing the courses of the vessels:

“It can readily be ascertained by applying the speed ratios, *whether the intersection of the known courses would be coincident*, whether or not the two vessels would come together.”



In another place it says:

“If the Alleghany did bear northwesterly and was three points on the Pomaron’s port bow, and the latter changed her course, it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course.”

The decision is a complete answer to the argument on behalf of the Selja, viz., that because one party admits a serious fault, the “but for” rule of the Pennsylvania case does not apply in determining whether the proven fault of the opposing vessel contributed to the collision. The Court considers itself entirely free from the question of proximity causation in determining whether or not the offending vessel, though committing what is manifestly a minor fault, should be held liable for its share of the damages.

The decision is also a complete answer to our opponent’s contention that the phrase “time of collision” as used in the Pennsylvania rule means at the moment of impact. Here the time of the collision is held to cover an act committed from five to seven minutes before the collision.

It also answers the contention that where a specific statutory rule is violated, the test of liability is not whether the course and speed of the violating vessel would have brought her to the colliding point if the law had been obeyed. The Court squarely bases its decision on the ground that the offending vessel has not shown that the vessels would not have reached the crossing point at the same time, if the violation had not occurred.

We thus have the following Circuit Courts of Appeal all agreeing with Judge Bean that the "but for" rule of the Pennsylvania case applies to vessels violating statutory rules of the road:

First Circuit (1905): Admiral Schley, 142 Fed. 67;

Second Circuit (1914): Yang-Tsze Ins. Co. v. Furness, Withy & Co. (Pomaron case, supra);

Fourth Circuit (1901): Merchants Trans. Co. v. Hopkins, 108 Fed. 890, 894;

Fifth Circuit (1907): The Ellis, 152 Fed. 981;

Sixth Circuit (1909): Hawgood Transit Co. v. Mesaba SS. Co., 166 Fed. 697 at 702.

"But for" the violations by the Selja of the "stop engine" rule, admitted in her libel, the collision would not have occurred. At her reduced speed she would not have reached the point of intersection till the Beaver passed on. The Beaver would have had longer time to have heard her whistles, and it cannot be said that this could not possibly have contributed to the collision. To hold her free from liability would mean to overrule all these other circuits and the Supreme Court decisions in the Pennsylvania and Martello v. The Willey, on which they rest.

The Pomaron, in its brief on appeal, in part based its argument against the "but for" rule on the decision of the same Court in the "St. Louis", 98 Fed. 750, and the Europe, 190 Fed. 475, which it offered in opposition to the "Beaver" decision (this case) in the Court below. The question of major and minor fault was also discussed fully by Messrs. Burlingham, Kirlin and Harrison, leaders of the New York Admiralty bar.

The decisions of the Circuit Court of Appeals and of Judge Hand are printed in full hereafter. (The italics and caps are ours.)

Respectfully submitted,

WILLIAM DENMAN,

IRA A. CAMPBELL,

*Proctors for Appellee.*

UNITED STATES CIRCUIT COURT OF  
APPEALS,

SECOND CIRCUIT.

Before—LACOMBE, WARD and ROGERS.

YANG-TSZE INSURANCE ASSOCIATION,

LIMITED, *et al.*,

Libelants-Appellees,

vs.

FURNESS, WITHEY AND COMPANY,

LIMITED,

Respondent-Appellant.

October

Term

1913

No. 201

Burlingham, Montgomery and Beecher, Proctors for Appellant; Charles C. Burlingham, Norman B. Beecher, Robinson Leech, Counsel.

Convers and Kirlin, Proctors for Appellees; J. Parker Kirlin, William H. McGrann, Advocates.

Harrington, Bigham and Englar, Proctors for Libelants-Appellees; Eugene J. Coleman, *et al.*, Howard S. Harrington, Advocate.

Kneeland, Harrison and Hewitt, Proctors for Appellee; Lawrence Kneeland, Counsel.

This cause comes here upon appeal to review a decree of the District Court of the United States for the Southern District of New York in favor of certain owners and underwriters of cargo of the German Steamship *Alleghany* for damages resulting from the total loss of the cargo as the result of a collision with the *Pomaron* on February 2, 1912.

The original libels were filed against the owners of the two vessels jointly. But the Hamburg-American



Company, the owner of the *Alleghany*, filed a petition for the limitation of its liability and surrendered the amount of its pending freight for the voyage and the libels were thereupon stayed as to that company.

ROGERS, Circuit Judge:

Furness, Withy & Company, Ltd., a corporation created by and existing under the laws of the United Kingdom of Great Britain and Ireland prosecutes this appeal to reverse a decree of the court below. Fifteen separate libels were filed against the above named corporation. The separate libelants were: Yang-Tsze Insurance Association, Ltd., *et al.*; Nord-Deutsche Insurance Company, *et al.*; Federal Insurance Company; Walter Oloffson, *et al.*; M. H. Silvera; Hazen and Company; Boston Insurance Company; Walter Despard; Eugene J. F. Coleman; Marshall K. Weidensaul; Frances W. Van Praag; Orton G. Orr; Laura Moore; Louis Bertschman; United States of America. The various libelants brought suits for cargo losses except the United States. The Government suit was for loss of registered mail carried by the Steamship *Alleghany* which sank at sea because of a collision with the Steamship *Pomaron*, and the suits were brought against the owners of the latter vessel. The suits were brought on for trial simultaneously having been consolidated, and heard on the pleadings and proofs. The court below rendered a decision that the libelants were entitled to recover. One decree was entered awarding in all, damages and costs amounting to \$172,029.81.

This collision occurred off the capes of Virginia about 11:30 A. M. on February 2, 1912. The *Alleghany* was on a voyage from New York to the West Indies. The vessel was an ordinary tramp steamer, 310 feet long. The *Pomaron* was a steel screw steamship of 1809 tons gross and 1027 tons net, 278 feet long, and belonged to Furness, Withy & Company, Ltd. She was on her way from Baltimore to European ports and loaded with grain and general cargo. The *Pomaron* sighted the *Alleghany* about an hour before the accident, the latter being some ten or twelve miles away and on her port hand. Each vessel kept her course and speed for some forty-five minutes. During that time the chief officer of the *Pomaron* had the *Alleghany* under constant observation. But during this time the *Alleghany* had not seen the *Pomaron* at all. This was occasioned by the fact that her chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. *The Alleghany did not discover the Pomaron until the latter blew one blast on her whistle and ported her helm. This was between five and seven minutes of the collision.* Between the time when the *Pomaron* saw the *Alleghany* and the time when she blew the blast on her whistle the two vessels had continued to approach each other without change of course or speed. At the time the *Pomaron* sounded her whistle the two vessels were about a mile apart and the *Alleghany* was proceeding at a speed of  $11\frac{1}{2}$  knots per hour and the *Pomaron* at a speed of 9 knots. After the *Pomaron* sounded her whistle the *Alleghany* shortly blew two blasts and thereupon the chief officer of the *Pomaron* at

once rang the engines full speed astern and ordered the helm hard-a-port. He testified that after he had rung full speed astern he saw the *Alleghany* had put her helm hard-a-starboard and he could see "she was swinging around, her stern was flying into us and of course, when he put his helm hard-a-starboard, his stern swung around and caught us on the bow, about abreast of No. 3 hatch." The bow of the *Pomaron* struck the starboard quarter of the *Alleghany* about 100 feet from her stern and about 3 o'clock in the afternoon the *Alleghany* sank. Before the collision the *Alleghany* was on a course approximately south and the *Pomaron* was on a course approximately east, the vessels being on crossing courses and the *Alleghany* having the *Pomaron* on her starboard hand. As the two vessels were on crossing courses they were subject to Article 19 of the International Regulations. That article is as follows:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

And Article 21 provides:

"Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

The *Pomaron* was to the southward and westward of the *Alleghany* and on the latter's starboard hand as the two vessels approached each other. These respective courses had been maintained for several hours prior to the collision, and the two vessels were about a mile apart when the *Pomaron*, the privileged vessel, changed

her course to starboard. In doing so she failed to comply with Article 21. The *Pomaron* seeks to excuse its porting under Article 27. That Article is as follows:

“In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.”

It becomes necessary, therefore, to inquire whether the special circumstances as they existed at the time the *Pomaron* altered her course was justified under Article 27.

The application of rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in *The Oregon*, 158 U. S., 186, 202, exceptions to the rules are to be admitted “with great caution and only when imperatively required by special circumstances of the case. It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules.” In Marsden’s *Collisions at Sea*, 6th ed., p. 455 it is said:

“But Article 27 applies only to cases where ‘there is immediate danger, perfectly clear’; and the departure from the rules must be no more than is necessary.”

The ‘special circumstances’ apparently relied upon to excuse the *Pomaron* under Article 27 is the testimony of the officer in charge of the vessel that he could see



no one on the bridge of the *Alleghany*. And attention is called to the doctrine of the Supreme Court in *The Delaware*, 161 U. S., 459, where it is said:

“The weight of English, and perhaps of American authorities, is to the effect that if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he must treat this as a ‘special circumstance’ under Rule 24 (now Rule 27), ‘rendering a departure’ from the rules ‘necessary to avoid immediate danger.’ ”

And the officer in charge of the *Pomaron* insisted that the change in the *Pomaron’s* course did not cause the collision. His testimony was as follows:

“Q. What was the danger? A. I saw if he was going to keep on the way he was doing he would catch us somewhere about the engine room.

Q. If you had maintained your course he would have struck you near the engine room? A. Yes, about midships.

Q. If you had both maintained the courses you were on then without change, what do you think would have happened? A. He would have run right into us amidships.

Q. Are you sure of that? A. Yes.

Q. Wouldn’t he have got across your bow? A. No, sir; couldn’t have done it.

Q. Could you have possibly got across his bow? A. No.” And on cross-examination he was asked, “do you think collision would have happened if you had not ported your helm? A. Yes, it would have happened in any case; she would have caught us somewhere probably about amidships if I had not ported.”

But there can be no doubt that it was the duty of the *Pomaron* to have kept on her course until a departure was necessary to avoid immediate danger. At the time

she ported her helm she was a mile away from the *Alleghany*, and the circumstances had not yet developed which justified any departure from the established rules. Her chief officer was asked: "In order to get the matter quite plain on the record, will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something?" To which he replied: "Really not until the *Alleghany* had given me two blasts on the whistle." At that time the two vessels were, according to his testimony, half a mile away from each other. He testified that up to that time he had appreciated risk of collision, but thought it might have been avoided by the other vessel. He then asked: "Then it became under the rule your duty to do something." And he answered, "Yes." "It had not been your duty to do anything before that?" To which he replied, "No, sir." It is established, therefore, upon the testimony of the chief officer of the *Pomaron* that he departed from the rule before it was necessary for him to do something to avoid an otherwise unavoidable collision.

We are obliged, therefore, to hold that the *Pomaron* not only violated Article 21, but that in doing so was not excused under Article 27. Concluding then, as we have, that the *Pomaron* was in fault, it remains to inquire whether the fault contributed to the collision. For if the fault had nothing to do with the collision it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether this fault of the *Pomaron* con-

tributed to the collision it is necessary to keep in mind the rule laid down by the Supreme Court in *The Pennsylvania*, 19 Wallace 125, 136 (1893), where the Court said:

“But, when as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the Statute.”

The principle thus laid down that when a ship at the time of the collision is acting in violation of a statutory rule the burden is on her to show not merely that her fault might not have been one of the causes, or that it probably was not but that *it could not have been one of the causes of the collision has been reaffirmed in subsequent cases and is the law beyond all controversy.*

Richelieu Navigation Company, 136 U. S. 408, 422, 423 (1890); *Belden v. Chase*, 150 U. S. 674, 699 (1893).

And the same rule is established in the English Courts. *The Agra*, L. R. 1 P. C. 501, 504, 505. *The Elizabeth Jenkins*, L. R. 1 P. C. App. 501. Under these decisions the burden of proof rests upon the *Pomaron* to show that the fault she committed could not have been one of the causes of the collision.

But whether the collision would or would not have occurred if the *Pomaron* had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the *Alleghany* from the *Pomaron* at the time. The bearing entered in the *Pomaron's* log is "about northeast", but both her chief officer and her wheelsman have testified that this is not correct, and that the bearing was between four and five points, nearer five than four. But the officer of the *Pomaron* for some inconceivable reason contented himself after his discovery of the *Alleghany* with one hasty sight over the compass to ascertain whether or not the bearing of the *Alleghany* was changing. He admitted that he watched the bearing of the *Alleghany* "just roughly" and that he "didn't bother to take any bearings at all", and that the *Alleghany's* bearing might have been more or it might have been less than three points if he "had taken a correct bearing". He is not to be excused for his failure to take correct bearings and should have taken several correct bearings during the forty-six minutes which elapsed from first sighting the *Alleghany* to the collision, or during the thirty-nine minutes from first sighting her to his change of course. Asked as to whether he took the bearing by the compass, he replied: "It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing." Then he was asked: "It was not a guess, you looked at the compass?" To this he answered: "It was not a true bearing, not an accurate bearing." He also testified that at that time the *Alleghany* was bearing north-



east and was three points or more on his port bow. The *Alleghany* remained on her original course until just before the collision. Whether she changed just before the collision is not free from doubt. The officer of the *Alleghany* who was on watch at the time says that "no commands were given to the steersman of the *Alleghany*", although the chief officer of the *Pomaron* states that the *Alleghany* swung under a starboard helm. If the *Alleghany* did bear northeast and was three points on the *Pomaron's* port bow when the latter changed course it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course. It can readily be ascertained by applying the speed ratios whether the intersections of the known courses would be coincident, whether or not the two vessels would come together. If the *Alleghany* was three points on the *Pomaron's* port bow and had not changed her speed or course she would have passed the point where the two courses intersected safely and some seconds before the *Alleghany* reached it. And if as some of the testimony indicated the *Alleghany* was five points on the *Pomaron's* port bow the *Alleghany* would have passed the point of intersection about two minutes before the *Pomaron* reached it. But in reality the contradictions in the testimony as to what the actual bearing of the vessels was makes it impossible to demonstrate whether or not any change at all in the *Pomaron's* course or speed was necessary to avoid collision. We have already cited the opinion of the chief officer of the *Pomaron* that the collision would have happened if neither vessel

had not changed. But we cannot accept his testimony on the point as conclusive. He estimated that the *Alleghany* was making thirteen knots and this according to his report to the Board of Trade was a knot and a half more than she was making. This would make a difference of 750 feet in the *Alleghany's* position in the five minutes which elapsed between the first porting and the collision.

The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers and, therefore, could be manoeuvred more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have examined the evidence in the case with care and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas and indeed vessels that navigate inland waters, entrusted with human lives and property of great value must be held to the strictest standards of conduct, and when

they fail to observe the requirements which the maritime law of the nations has prescribed are to understand that they must abide the consequences.

That the negligence of the *Alleghany* was inexcusable and even unparalleled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout. The owners of that vessel filed a petition for limitation of liability and surrendered the amount of the freight for the voyage.

The Court below assessed the *Pomaron* with the full loss while stating that the case was one "which shows the necessity for the proposed new rule which will not hold each ship *in solido* but will apportion liability according to fault". And it was urged upon us in argument that the Court erred in not apportioning the damages in accordance with the degree of fault. Attention was called to the fact that the *Alleghany* was a German vessel and that her cargo, for the loss of which the suit was brought, was shipped under bills of lading issued by the Hamburg-American Line, a corporation organized under the laws of the German Empire. And as the *Pomaron* was a British vessel it is said it was the duty of the Court to have taken judicial notice of the fact that by the Maritime Conventions Act (land 2 Geo. V. C. 57) the English rule as to division of loss by collision due to mutual fault was modified in accordance with the convention signed at the Brussels Conference in 1910. In like manner it is said that judicial notice should have

been taken of §735 of the Commercial Code of Germany of May 10, 1897, which reads as follows:

“If the collision is caused by faults of both sides, then the liability for damages, as well as the amount of the damages to be paid, depends on the circumstances, especially to what extent the collision has been caused by the prevailing fault of the members of one or the other crew.”

It may be that at the time when this collision occurred the laws of Great Britain and Germany coincided in providing that the liability for damages is to be in proportion to the degree in which each vessel is in fault. If the foreign law had been pleaded and proved, the Court had assessed the damages in accordance with it, there would have been some authority for so doing.

\* \* \* (Discussion of proof of foreign law.) \* \* \*

We do not wish, however, to be understood as intimating in what we have said that even if the foreign law had been pleaded the Court could have assessed the damages according to the principle adopted by statute in Great Britain and in Germany. Whether it could or could not have done so is not now before us. And we do not find it necessary under the facts disclosed in the present record to consider how the decision of the Supreme Court in *The Oceanic Steam Navigation Company, Limited v. Mellor*, announced May 25th, 1914, and not yet reported affects the question.

Decree affirmed.





*United States District Court, Southern District of  
New York.*

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The Federal Insurance Company,  
against  
Furness, Withy & Co., Ltd.

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Eugene J. F. Coleman and others,  
against  
Furness, Withy & Co., Ltd.

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Nord-Deutscher Insurance Co.,  
against  
Furness, Withy & Co., Ltd.

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Yang-tse Insurance Co., Ltd., et al.,  
against  
Furness, Withy & Co., Ltd.

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This is a suit in admiralty arising out of a collision on the high seas on February second, 1912, at about half past eleven in the forenoon some one hundred miles off the Chesapeake Capes, between the steamer Alleghany (sic) and the steamer Pomaron. The libelants in the case represent the cargo of the Alleghany which was sunk by the collision, and the suit is between them and the owners of the Pomaron. The weather was clear, the wind and sea moderate. The Alleghany, an ordinary tramp steamer, three hundred and ten feet long, had left New York the previous

night, bound for the West Indies, and was then on a course south two degrees west true, at a speed of almost exactly eleven and one-half knots an hour. The Pomaron, a similar steamer, two hundred and seventy-eight feet long, had left Baltimore February first at seven a. m. and was on a course east nineteen degrees north true, at a speed of about nine knots. The collision occurred about one hundred and ten miles outside of Cape Henry in thirty-seven degrees twenty-six minutes north and seventy-three degrees and forty-two minutes west. These facts are all conceded. From them it results that the angle between the courses of the vessels was one hundred and eleven degrees. The Pomaron sighted the Alleghany at about ten thirty, some ten or twelve miles away on her port hand, the exact bearing being one of the points in dispute. Each vessel kept her course and speed for about forty-five minutes. During that time the chief officer of the Pomaron had constantly observed the Alleghany, and taken her bearing roughly over his compass, which he made about northeast. The Alleghany had not, however, seen the Pomaron at all. This was due to the fact that the chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. As the wind was from the west, there were dodgers upon the starboard end of the Alleghany's bridge, and either these or the situation of the quartermaster at the wheel, prevented him from seeing off on his starboard hand. No lookout was kept, and the quartermaster was steering by a course, the result being that the Alleghany did not see the Pomaron until the Pomaron herself blew. The Pomaron's chief

master, Westgarth, kept his course and speed as required by the twenty-first article of the International Rules, until a time which he places variously between five and seven minutes of the collision. Then he blew one blast and directed his quartermaster to port his wheel a little. The only testimony of the amount of this porting comes from the testimony of Westgarth and the quartermaster, which shows that at the end of the time the ship had changed her heading one point to starboard. They and the boatswain place the period at one minute. Meanwhile the Alleghany had kept her course and speed unaltered, although the giving-way vessel. At the end of the period, whatever it was, the Alleghany blew two blasts, and put her wheel hard-a-starboard. At that moment, or soon thereafter, the Pomaron hard-a-ported and telegraphed to her engine-room "full speed astern". This order was executed in the engine-room in about half a minute, perhaps less, as her engineer testified, and she continued under reversed engines until the collision. The time between the reversal of the engine and the collision is stated by the engineer to have been three minutes and a half. This he says he observed upon the clock in the engine-room opposite which he faced. Both the chief officer and the quartermaster agree that the time between the Alleghany's whistle and the collision was four minutes. All the Pomaron's crew agree that the Pomaron had very greatly diminished her speed. The captain of the Alleghany who had come on deck says that the Pomaron had not reversed until the vessels were near enough for him to shout to Westgarth to do so, at which time he put over his telegraph. At the



time of the collision the vessels had changed their headings considerably. The only testimony upon this point is given by Westgarth, who says that the Alleghany was headed southeast by south and the Pomaron east southeast, but that the angle of collision was four points. The bow of the Pomaron struck the starboard quarter of the Alleghany somewhere between hatches three and four, not less than one hundred feet from the stern. The latter was under full speed, and she went on past the Pomaron until her engines were reversed and she stopped. Being badly damaged, she put about for Norfolk, but was found to be in sinking condition a few hours afterwards and her passengers and crew were taken on the Pomaron, which then stood by until the Alleghany sunk, at about three o'clock.

KNEELAND HARISON & HEWITT ESQS.

(Lawrence Kneeland) for Federal Insurance Co.;

HARRINGTON, BIGHAM & ENGLAR ESQS.

(Howard S. Harrington) for Eugene J. F. Coleman, et al.;

CONVERS & KIRLIN ESQS.

(J. Parker Kirlin and Wm. H. McGrann)  
for the Yang-tse Insurance Association  
and Nord-Deutsche Insurance Co.;

HENRY A. WISE ESQ. and A. S. PRATT ESQ.,  
for U. S. of America;

BURLINGHAM, MONTGOMERY & BEECHER ESQS.

(Charles C. Burlingham, R. Leech and B. W. Wells) for respondent.

HAND, D. J. The libelants charge three faults against the Pomaron; first, that the vessels are not shown to have been in risk of collision; second, that the Pomaron changed her course before the time mentioned in the Note to Article Twenty-one; third, that her manoeuvres in extremis directly brought her into collision. I have found the case extremely complicated in the facts, but I believe that a sufficiently painstaking analysis of the testimony admits of more certainty than at first appears to be possible. Most of my conclusions as to the distance and bearing of the vessels at different times can be proved by the use of a simple logarithmic table together with the theorem that the sides of a triangle are in proportion to the sines of the opposite angles, but I have not appended the details of the calculations, as they can be easily verified.

The first question to determine is whether the situation was one actually involving risk of collision. This the rules define as one in which the bearing does not appreciably change. We know that the constant bearing which would have brought them into collision, was almost exactly thirty-nine and one-fourth degree or three and one-half points. However, the constancy of the bearing applies only at substantial distances; thus, when the vessels were a half mile apart, the Alleghany might have opened one-half a point and yet when the Pomaron's stern crossed the Alleghany's course the Alleghany's bow would have been only one hundred and sixty-four feet away, much too close a shave. At half a mile apart the Alleghany was in that event one thousand nine hundred and ninety-five feet

from the point of crossing and the Pomaron one thousand one hundred and fifty-six. If on the other hand the Alleghany had closed one-half a point at a distance of half a mile, the Alleghany's stern would clear the Pomaron's course when the latter's bow was only one hundred and seventy feet away, also too close a shave. In that case the Alleghany would have been one thousand five hundred and sixty-six feet from the intersection and the Pomaron one thousand six hundred and thirty-seven feet. Even if the Alleghany had opened a full point, still the Pomaron would have been justified in regarding the case as one involving risk of collision, for her stern would have cleared the Alleghany, a course when the latter was only about six hundred and eighty feet away; and that, in the case of two vessels of the length of these, and moving at their speeds is no more than enough leeway to allow for incorrect estimates of distance and speed. The distances in that case would be respectively two thousand one hundred and eighty-two feet and eight hundred and ninety-seven feet. As nearly as the vessels can be placed from the testimony it will appear that the Alleghany after the Pomaron blew was at least as far away as the Pomaron from the intersection of their courses, and not more than one thousand feet further. At that time, therefore, there was a risk of collision and there could not therefore have been appreciably more than half a point of variation in the bearing from that absolutely constant bearing which would have brought their bows in collision, and which must have existed up to that time. I therefore find that whether or not Westgarth's observation of "about" northeast was careful enough

(it was actually NE  $\frac{3}{4}$  N), the bearing had been in fact substantially constant, that there was in fact risk of collision within the meaning of the rule, and that he was justified in manoeuvring on that assumption. It seems hardly worth while further to elaborate the reality of a danger which everybody who was present thought imminent and certain before the Pomaron backed, and which was at once realized.

The next fault alleged against the Pomaron is her initial porting when the vessels were about one mile apart. This every one agrees was before the period had arrived under the Note to the Twenty-first Article, after which the Alleghany could not alone avoid collision. Under all the authorities it was a clear violation of the rule and imposes on the Pomaron the duty of showing that it could not have contributed to the disaster. The facts are that the Pomaron blew once and ported slightly, that the Alleghany thereupon awoke, her chief officer ran out of the chart room, thought at a glance that it was too late to port, blew two blasts and hard-a-starboarded, that, when the Alleghany blew twice, Westgarth hard-a-ported and gave the order to reverse, and at the end of half a minute did get his engines in reverse till the collision. First, I have to find out how long a time elapsed between the two signals. Westgarth first put it in the log as three minutes but later he, Hyslop and Hogg put it at one minute. He further said that the vessels had moved from one mile apart to one-half, during the period he was under this initial helm. If the angle was thirty-nine and one-quarter degrees, the distance covered by



the Pomaron while the distance apart decreased from one mile to one-half was fourteen hundred feet which she would cover in about one minute and a half. Again, consider that although Hyslop, who best knew, says that the helm was not steadied, the total change in direction was only one point. It is hardly possible that a vessel of the Pomaron's size should travel over ten lengths under any change of helm at all and make no more change than one point. The surest way to judge of this is, not to take the witness' estimate of time or distance, but to consider the situation: The Alleghany's chief officer heard the Pomaron's signal in the chart-room and at once ran out; he was alarmed by it and its discovery of him off duty. We must assume that he used all possible haste and took no long time to determine what he would do; the occasion permitted no reflection. When he decided, he answered by two long blasts and put over his wheel. To suppose that this took more than a minute appears to me extremely unlikely and unreasonable; to assume it took a full minute is indeed doubtful. That it should have seemed a long time to Westgarth and Hyslop is reasonable, while they were being forced to hold that most trying of positions, a holding-on ship's, while the giving-way ship continues on her course and speed closer and closer. Therefore I find the shorter estimate to be the correct one.

The question still remains whether the Pomaron can show that this initial porting could not have produced the collision. In order to know this we must ascertain what actually happened after the Alleghany blew and

put over her helm hard-a-starboard. I think it must be conceded that the Alleghany's story is true that the helm was put hard over substantially at the same time as the whistle was blown; to suppose any real delay is impossible and no one suggests it. The speed was, if anything, increased for the telegraph was twice put full speed ahead. Moreover, we know from Westgarth—and there is no reason to suspect it,—that the Alleghany, when struck, had starboarded not more than three or three and a half points. Westgarth puts her at southeast by south. If so, her stern had not yet left her course and she had not at most travelled more than three lengths or nine hundred and thirty feet in “advance”. At her speed she would travel one thousand one hundred and sixty-five feet in a minute and we may safely say, even allowing for her diminution of speed from her helm that she could not have been travelling over a minute from the time her helm went over.

Now the result of this is necessarily entirely to discredit the estimate of time of Westgarth, Johnson and Hyslop, and rather to credit the captain of the Alleghany who says that Westgarth put his telegraph full speed astern only when within hail. That there could have been anything like four minutes between the Alleghany's whistle and the collision seems to me so demonstrably untrue that I have no trouble in disregarding the testimony. The result is absurd, unless we suppose that after blowing the Alleghany kept her helm amidships for three minutes. Even if we suppose that the Alleghany changed her course more than Westgarth says it does not help matters, for if the Alleghany was

running for four minutes under a hard-a-starboard helm, she would move four thousand six hundred and sixty feet. To be sure her helm would check her speed, but if her speed only averaged seventy per cent of 11.5 knots she would have travelled three thousand two hundred and sixty feet; and she would have turned through eight points and have been on parallel courses with the Pomaron in an "advance" of four lengths or only one thousand two hundred and forty feet, or before she reached the Pomaron's course. Again we must remember that even if it took four minutes for the ships to come into collision the Pomaron was not over two thousand feet away, and if the Alleghany was anything like four thousand six hundred and sixty feet away at the time it was a simple thing for her to port under the Pomaron's stern as the rule requires. We must suppose that she was at once near enough to make that manoeuvre seem impossible and yet that the Pomaron was so near as to make starboarding in fact impossible. We must also remember that the collision happened not far from the intersection of the courses, as I shall show.

Now it may be thought that this does violence to the testimony, but remember that there is some testimony to the contrary, and also that Westgarth's first time estimate of the original porting was absurd. His own and Hyslop's estimate of four minutes I should not have the least compunction in disregarding, were it not for Johnson's corroboration said to be taken from the clock. As to that, moreover, I am encouraged to disregard it, because it is clearly only approximate any

way. The shock was "about" 11:24. I was reversed "five" minutes. It takes "four" minutes to stop—though the Pomaron was by no means stopped. "I might easily have been out half a minute or three-quarters", because I saw the hands at an angle (one minute is quite within the possibilities). "Three" minutes is the usual rule for stopping. "Four" minutes is about near it. All this does not indicate an exact observation and I don't believe that he ever made one. It may have been thought important for the Pomaron to get as much way off as possible, and the witnesses moreover were corroborated in their natural bias, by what to the men on deck must have seemed the interminable period during which the ships were in extremis.

Consider next the actual manoeuvre of the Pomaron. She was under a hard-a-starboard helm for the first half minute—the time it took to get the engines reversed. She had, therefore, with unchecked speed, travelled over four hundred and fifty feet, or nearly two lengths; during that time, her way being on, she had already swung nearly two points to starboard, before the screw was reversed. Thereafter under a reverse she would continue to swing to starboard though more slowly than if the engines were still ahead. Mr. Kneeland has cited from Knight the case where the engines are reversed at the same time that the helm is put hard over; he did not observe that "If the ship had actually begun to swing in obedience to a hard-over helm before the screw is reversed, she will in most cases continue to swing in the same way in spite



of the screw, although much less rapidly than if the screw were not reversed''. How was it possible for the Pomaron to keep swinging to starboard for three and a half minutes more and still gain nothing to starboard beyond the two points she had made before the screw was reversed, for we must remember that she was headed about east southeast when she collided. As I view the collision, therefore, it occurred very much sooner after the Alleghany blew than four minutes, probably not over one minute after that time, certainly not two.

Having fixed the time of the manoeuvres we must next fix the positions of the vessels at the time of collision. As I have shown: the Alleghany's stern was still on her original course and she was at an angle of not more than three or three and a half points from it. As the collision occurred about one hundred feet from the stern we can easily calculate that the place of collision was somewhere about sixty feet to the east of the Alleghany's course. We can also tell how far to the south of the Pomaron's course the collision occurred if we assume that the Pomaron's stern was still dragging along her course; it would be about one hundred and sixty-five feet. To assume that the Pomaron's stern had not left the course is to assume that in this respect the vessel would have acted as if all the change of heading had been produced by a hard-over helm. As to this Knight says "In this case", where a small angle of helm is used, "also, the stern is thrown off and for some time the body of the ship moves along a line to leeward of the original course".

When the helm is hard over we know that the "some time" is two or three lengths and until the vessel has changed more than three points. There are, as far as I have found, no results of experiments with helms slightly over, but I think it fair to assume from the results set out by Knight that in about three lengths and with a change of only one point, the stern would not have left the course.

Another consideration corroborates this conclusion as to the distance to the south of the Pomaron's course that the collision must have occurred. The Alleghany's bow must have been at least two lengths away from the point of intersection when the helm was put over, because the Pomaron must have been at least six hundred feet away herself and the situation was such that the Pomaron could still suppose the Alleghany could cross under her stern. If so, the stern of the Alleghany was three lengths away and could not have much more than passed that point when the collision occurred, because if so the ship would have turned more than three and one-half points, a turn she will make in not more than three lengths. If so, the collision was not much to the south of the Pomaron's course, which is just where it ought to be if the Pomaron's stern had not yet left her own course.

If we assume that the stern of the Pomaron remained upon her old course till collision, that she headed east southeast, that the stern of the Alleghany remained on her course, that she headed southeast by south and that she was struck one hundred feet forward of her stern we can exactly find how far her stern was from the

intersection of the two courses; it was seventy-six feet. If we then assume that the Pomaron had not originally ported, but had in extremis done precisely as she did do, we can find at what part her bow would have crossed the course of the Alleghany; it would have been one hundred and twenty-seven feet from the intersection of the courses. If we assume therefore that the Pomaron's bow would have reached the course at the moment of the collision a collision was inevitable, even with an allowance of fifty feet. However, this assumes that the Pomaron changed her heading, but not her course, and there may be a question of this. All we certainly know is that when so much change of heading occurs under a hard-over helm the stern does not leave the course. We cannot know whether under the slight helm for the first minute the Pomaron may not have changed the course or "drift" of the ship. All we can say is that if she did change it at all, it was less than the one point change in her heading, because a turning ship always heads in upon the course she is at any given moment following. However, a very small change in her course would fix the collision at a place where the Pomaron's bow would have swung clear, had there been no original porting. Thus if the angle of drift had been only five degrees with original course when the Pomaron hard-a-ported, nevertheless she need have travelled only about five hundred and fifty feet to place the Alleghany's stern beyond the sweep of the Pomaron's bow. Indeed if the change of course were only three degrees or one-quarter of a point she need only travel about nine hundred and ten feet, or during

the first minute after the telegraph was set full speed astern. It is plain enough that a very slight variation in her drift caused by the first porting might have made the difference between collision and safety.

However, it may be said that this is unfair because the time at which the Pomaron's bow would have entered the course of the Alleghany's stern was earlier than the moment of collision and that therefore the Alleghany must be put back further on her course. It is true that the bow of the Pomaron had to travel about sixty-five feet to the east of the Alleghany's course to come into collision but even if the Pomaron was travelling then at only seven knots per minute, it would have taken her less than six seconds to do this during which time the Alleghany would move only about one hundred feet. Besides this we must remember that the course of the Pomaron's bow to the Alleghany's course after she ported was more nearly at right angles than if she had not ported which means that her bow took a little shorter time to reach the Alleghany's course than it would otherwise have done. This difference if the actual distance to the Alleghany's course was nine hundred and twelve feet, i. e., if it took one minute to reach it, is about fifty feet which very nearly equals the distance to the east of the Alleghany's course which the bow had to go to get into collision.

Now it must be apparent to any candid person that when the Pomaron has the burden of proof all such calculations are the merest of speculation. I have followed them out,—and an immense deal more,—with a quite disproportionate expense of time in the hopes



of finding some adequate ground for exonerating the Pomaron, a result which my sense of justice very greatly impels me to accomplish. It seems to me most unjust to hold that this ship should bear this loss, but although I have tried in every way I could think of to prove that the initial porting could not have contributed to the collision, my final conclusion is that absolutely no certainty whatever is possible and that the exact facts have forever disappeared in the fleeting situation which has left no permanent memorial. If a ship which violates a rule becomes the guarantor of such proof, she must usually suffer. I do not weigh for a moment Westgarth's testimony that the initial porting made no difference.

The last question is of the Pomaron's manoeuvres in extremis. It seems to me reasonably clear that, had Westgarth starboarded, he would have cleared the Alleghany. Such a manoeuvre, even after the initial porting, would have probably thrown his bow off to port far enough to clear, and although the sterns might have collided, it is not likely. Had he held his course till the Alleghany blew and then hard-a-starboarded, this would have been more certain. However, it does not follow that he should be held at fault for a wrong choice in extremis. Knight, page 258, does not recommend the manoeuvre unless collision is inevitable and then only because it presents the holding-on vessel's bow to the danger, a failure to do which hardly lies as a complaint in the mouths of these libellants. He recommends that a holding-on vessel in this position port and keep her speed, but adds that it is a situation

for which no hard and fast rule is applicable. It seems to me to be well within the rule in extremis. It must be remembered that for each vessel to move off from the other, as actually happened, made the courses converge and decreased the seriousness of the resulting collision in proportion. To starboard was to insure that if any collision did occur, it would be at right angles or near it. After figuring it out, I may now conclude that a hard-a-starboard helm would have saved the day, but Westgarth had no means for such a calculation and was suddenly confronted with the very worst manoeuvre which his adversary could execute. He did the thing usually best and I will not therefore hold him for not starboarding.

The next question is of the Pomaron's failure to keep her speed. In the first place I do not think this had much to do with the collision in any event. If it took the Pomaron half a minute to reverse her engines, there could have been very little chance for a very marked change of speed. We may, however, suppose that the Pomaron's speed was reduced to seven or eight knots an hour; this was an advantage, but played no great part. Was it a wrong manoeuvre in any event? It appears to be well settled that a vessel which ports should keep her speed, if she means to get away altogether, Knight, page 356. This is true for two reasons, first because she turns in a much shorter compass when her movement is not contradicted by her screw, and second, because she passes more quickly out of the course of the other vessel. Had Westgarth any opportunity to clear the Alleghany this would have

been his best manoeuvre, though it would not necessarily have been fair to charge him for failing *in extremis* to choose the best. If, on the other hand, he had no chance to escape at all, as he certainly had not under a port helm, he did what was best because he tried to lessen the shock of collision, and he kept his own boat afloat and at least improved the chances of the Alleghany. It is true that the angle of collision might have been less and the blow more glancing, but it is a question whether this would have made up for the greater speed. At least he could not have crossed her bows, which is what the manoeuvre requires, and he was surely not to blame for refusing to expose his side.

The necessary conclusion is that the Pomaron must be held for Westgarth's original porting, under the rule in the *Pennsylvania*, 19 Wall. 125, and the *Agra*, L. R. 1 P. C. 501. The time had not yet come when he needed to act alone, and his action was not in *extremis*; it was to assist the other vessel to accomplish her duty. I have already said that the result seems to me extremely inequitable and I should be glad if an appellate court could find otherwise, but while the holding-on ship is charged with the burden of proof, I can see no alternative. The case is one which shows the necessity for the proposed new rule which will not hold each ship in *solido*, but will apportion liability according to fault. Had that been open to me, I should have attributed a very small fraction of blame indeed to the Pomaron. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no

escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision. The only evidence which we have is necessarily wholly approximate and inexact; we should not treat it as the foundation for mathematical calculations without making large allowances, more than fifty or one hundred feet. The whole problem seems to me to come down to this; whether I should loyally apply the harsh rules as I find them to the evidence, or should try to mitigate their injustice by an appearance of certainty in deduction from shifty and unreliable data.

The libellants will take the usual decrees.





No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

*Appellant,*

VS.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Claimant of the American Steamship "Beaver",

*Appellee.*

## APPELLANT'S REPLY TO APPELLEE'S "MEMORANDUM" ARGUMENT ON THE "POMARON" CASE.

E. B. McCLANAHAN,

S. H. DEBBY,

*Proctors for Appellant.*

*Filed this.....day of August, 1914.*

**Filed** FRANK D. MONCKTON, Clerk.

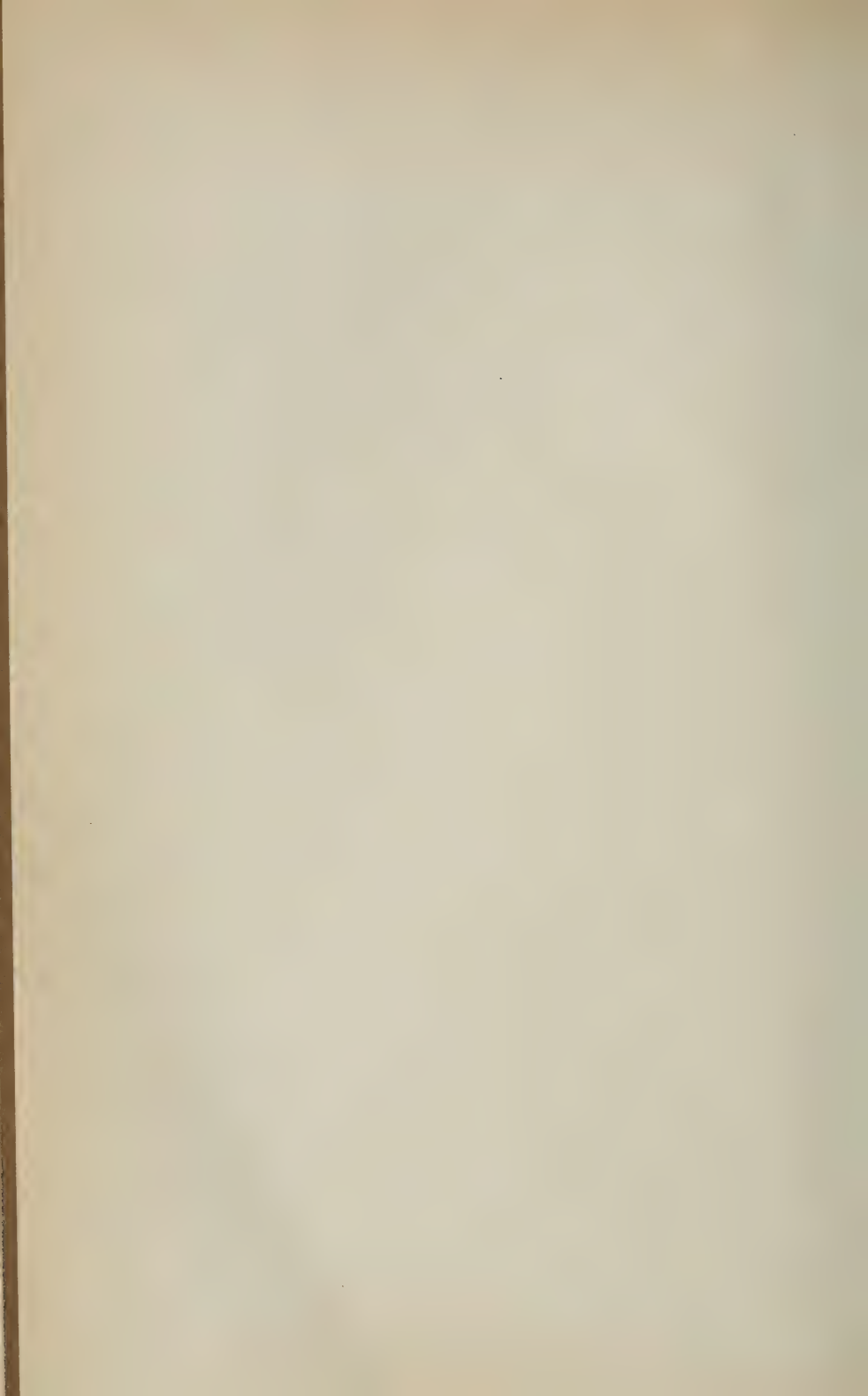
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AUG 14 1914









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# United States Circuit Court of Appeals

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OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

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*Appellee.*

## APPELLANT'S REPLY TO APPELLEE'S "MEMORANDUM" ARGUMENT ON THE "POMARON" CASE.

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In answering the argument based on the Pomaron-Alleghany decision of the Circuit Court of Appeals for the Second Circuit, we are constrained first to revert to statements made therein which are not warranted by any of the facts of the case. For the evident purpose of attracting the court's serious and favorable attention the argument commences with the statement

that the facts "*are so analogous to the case at bar*" that the case should receive the court's attention in any opinion to be rendered (Memo. pp. 1-2). A most cursory reading of the opinions of both courts in the "Pomaron" case refutes this statement of analogy, and shows on the contrary that in the circumstances of the two cases there is not to be found a single material point of similarity.

As showing the superficial character of counsel's consideration of this case we call attention to the fact that the suit was not brought by one colliding vessel against another, as intimated by counsel (Memo. p. 2), but was initiated by the cargo owners of the "Alleghany" against the owners of *both* vessels. As, however, the Hamburg-American Co., owner of the "Alleghany", petitioned for limitation of liability and surrendered the vessel's pending freight "*the libels were thereupon stayed as to that company*" (Memo. p. 10), and the record shows that neither the "Alleghany" or her owners were represented by counsel. Furthermore, on this same subject, there was no insistence on the part of the owners of the "Alleghany" for a division of damages, as stated by counsel (Memo. p. 2), nor do we find in the record any admission of liability on the part of that vessel,—in fact, because of the limitation of liability referred to, the *full loss* was assessed against the "Pomaron".

Again, in seeming justification of the statement that "*the fault of the Pomaron was of relatively minor importance*" (Memo. p. 2), thus pointing to an analogy with the "Selja's" minor fault, counsel says that it

was committed in broad daylight when the vessels were a mile apart and between five and seven minutes before the collision. The appellate court, however, on this subject of relative fault says that under the circumstances of a collision between *steamers* on the *high seas*, *unembarrassed by the presence of other vessels, in broad daylight and clear weather* where they are in *plain sight of each other when miles apart*, "*plain common sense*" constrains one to the conclusion that it would be difficult to account for the collision unless both vessels were in fault in failing to exercise reasonable care, and that to exonerate either under such circumstances could be justified only if upon the closest scrutiny of the navigation of each vessel it could be shown that one of them was free from culpable blame (Memo. p. 19). "We have examined the evidence in the case with care and we have not been satisfied that either of these vessels was free from fault" (Id.). Indeed, it would appear that to the appellate court the fact that the collision took place in broad daylight in clear weather when the vessels "*were in plain sight of each other when miles apart*" was the *compelling reason* for its refusal to relieve the "Pomaron" from the burden of a rule (the rule of the "Pennsylvania" case) characterized by the lower court as "*mechanical and arbitrary*" (Memo. p. 40).

Counsel's opening and emphasized statement, therefore, that the facts of the "Pomaron" case are analogous to those of the case at bar is disclosed as a pretty illustration of the adage that the wish is father to the thought.



Passing now to the announced law of the case, we can discuss it briefly for the reason that *in no material aspect does it differ from that of other cases hereinbefore fully cited and commented on*. The court finds that at the time of the collision the "Pomaron" was in the active present violation of Article 21 requiring a privileged or holding on vessel to keep her course. It also finds that the vessel's excuse for being in this situation was not well taken because, when the act was done which led to the predicament in which the "Pomaron" found herself at the time of the collision, there was then no "*immediate danger*" warranting a departure from the duty imposed by the rule on a privileged vessel. It being established, therefore, that, without justifiable excuse, the "Pomaron" was on a changed course at the time of the collision, it necessarily followed that the rule as to the burden of proof laid down in the case of the "Pennsylvania" became applicable.

Assuming the correctness of counsel's statement (Memo. p. 7) that the brief for the "Pomaron" invoked the decision in the "St. Louis" case against the application of this burden of proof rule, it becomes evident, as the "Pomaron" and "St. Louis" cases were decided *by the same court*, that if the contention as to the facts made in the latter case coincides with the clearly proven facts of the case at bar, then there should be found in the "Pomaron" case something that distinguishes it. In the "St. Louis" case it is announced, that on the authority of the Supreme Court in the "Umbria" case, the trial court would unquestionably have been right in exonerating the "St. Louis" if its finding as to the

speed of the "Delaware" and the backward movement of the "St. Louis" at the moment of impact was correct. But such finding was not correct and, therefore, the case was one

*"for the application of the rule in collisions that whenever it appears that one of the vessels has neglected the usual and proper means of precaution the burden is upon her to show that the collision was not owing to her neglect".*

In the case at bar both of these controlling facts of the "St. Louis" case are proven and admitted,—the immoderate speed of the "Beaver" as well as the backward movement of the "Selja".

In the "Pomaron" case the court applied the burden of proof rule because it found that the circumstances made it applicable. It found further that when the "Pomaron" first ported *"the circumstances had not developed which justified any departure from the established rules"*, and that, therefore, the *"immediate danger"* referred to in Article 27 had not yet become apparent. It was not, therefore, the immediate, unjustifiable act of porting, some five or seven minutes before the collision, that alone brought the "Pomaron" within the burden of proof rule, but the additional fact that the resulting altered course of the vessel existed *"at the time of the collision"*.

Although, in determining whether the "Pomaron" had met the burden thus thrown upon her, because of her predicament at the time of the collision, the court attempts to work out and apply a test which is said in the "Umbria" case to be *manifestly improper*, still

we submit, that as bearing on the case at bar, this attempt becomes immaterial when it appears that an evidently controlling reason for holding the "Pomaron" liable is found in the special circumstances of a "*clear weather*" collision where the vessels "*were in plain sight of each other when miles apart*".

Why the court should in the "St. Louis" case expressly approve of the test of contribution laid down in the "Umbria" case, and in the "Pomaron" case apparently resort to the contrary *speed ratio* test of the English case of the "Brittania", we are unable positively to explain, unless because of the dissimilarity in the facts (as was the court's excuse in the "Admiral Schley" case), or the explanation may be found in the suggestion that the court was simply analyzing the "Pomaron's" only proof of non-contribution and was unheedful of the exact propriety of the test it applied. However this may be, the fact remains that if the evidence in the "St. Louis" case had established, as it was intended to do, exactly analogous ~~facts~~ <sup>facts</sup> to those of the case at bar, the court would have exonerated the "St. Louis".

As we have previously said, the burden of proof rule of the "Pennsylvania" case is limited by its express terms to violations existing "*at the time of the collision*". Counsel, in the present argument, still persists in *misconstruing* (see appellee's main brief, p. 75, and appellee's reply brief, p. 2) our contention as to the meaning of this phrase (Memo. p. 6), and we refrain from again stating it for manifestly the court will not be misled by counsel's inability, or reiterated refusal,

to understand us (see our main brief, p. 121, and our reply brief, pp. 6-7).

In conclusion and to summarize, we submit that the opinion in the case of the "Pomaron", which, at the request of counsel, was intended to halt the opinion of this court, so clearly discloses facts radically different from the facts of the case at bar that it cannot possibly affect the decision of this court; that certain of these facts, in the opinion of the court, made the collision so inexcusable that "*plain common sense*" constrains one to the conclusion that both vessels failed to exercise reasonable care; that certain other facts clearly established the applicability of the rule of the "Pennsylvania" case; that the seeming adoption of the speed ratio test on the question of contributory negligence can in no respect affect the decision of the case at bar for the reason that here the "Pennsylvania" rule does not apply; moreover, should it be held to apply, the refusal of our Supreme Court to follow the speed ratio test is controlling on the question of contribution, and that on that question the law is established beyond dispute that the only proper test lies in the determination of whether a vessel's speed in a fog can be stopped before her arrival at the point where the courses of the two vessels intersect. The court will remember that in speaking of the speed ratio test in the "Umbria" case the court says: "*Manifestly this is not the proper test.*" Furthermore, in the "Belgian King" case, the court says:

*"The rule is that a vessel in a dense fog is bound to observe unusual caution and to maintain only*



*such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog."*

This is what the careful navigation of the "Selja" enabled her to do, and we submit that what happened before, if it in no wise hindered or embarrassed the "Beaver's" movements, becomes immaterial on the question of contributory negligence.

Counsel's newly suggested point, that if the "Selja" had been longer delayed in reaching the intersection of the courses, the "Beaver" might have heard more of her whistles, is far from convincing. We suggest that her great speed was an effective and continuing cohibition on her ability to hear the "Selja's" whistles, and that her fixed purpose to make speed in a fog overrode and controlled all other considerations. She had heard whistles, and many of them, blown from vessels other than the "Selja" without being affected in her conduct in the slightest. The inference, therefore, is strong that even though it had been possible for her to have heard more of the "Selja's" whistles her speed would have remained undiminished, and her course unaffected.

Dated, San Francisco,

August 12, 1914.

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*

No. 2365

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian  
Steamship "Selja", on behalf of him-  
self and the owners, officers and crew  
of said steamship,

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP  
COMPANY (a corporation), Claimant of  
the American Steamship "Beaver",  
her engines, etc.,

*Appellee.*

## APPELLANT'S PETITION FOR A REHEARING.

E. B. McCLANAHAN,

S. H. DERBY,

Merchants Exchange Building, San Francisco,

*Proctors for Appellant  
and Petitioner.*

**Filed**

JAN 30 1915

**F. D. Monckton,**  
Clerk.

Filed this.....day of January, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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OLAF LIE, Master of the Norwegian  
Steamship "Selja", on behalf of him-  
self and the owners, officers and crew  
of said steamship,

*Appellant,*

VS.

SAN FRANCISCO & PORTLAND STEAMSHIP  
COMPANY (a corporation), Claimant of  
the American Steamship "Beaver",  
her engines, etc.,

*Appellee.*

## APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

Appellant herein respectfully petitions for a rehearing  
of this case upon the following grounds:

1. Unfortunately and unaccountably the court has  
approached, considered and decided the question of the  
"Selja's" contributory liability for this collision upon  
a hypothesis of fact contrary to any possible theory



on which it might be said the case was tried, and unsupported by any conceivable construction or interpretation of the record. Namely, it bases its conclusion of contributory fault upon a finding that the "Selja's" engines were not stopped until *one minute* before the collision, when in fact they were stopped *six minutes* before the collision.

2. In the court's statement of the burden of proof rule of the Pennsylvania case, there is a clear misconstruction in this, that, as stated by the court, the rule places upon a vessel, which has committed a positive breach of a statutory duty, the burden of showing that such breach could not have contributed to the collision, *and this, seemingly irrespective of the time when the breach of the rule has occurred.*

3. In considering the *test* of contribution to a fog collision, the court applies one in this case which has expressly been declared by the Supreme Court of the United States as "*manifestly \* \* \* not the proper test*".

4. In considering the respective faults of the "Beaver" and "Selja" the court has failed to apply in the "Selja's" behalf the major and minor fault doctrine applicable to this collision.

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### Argument.

#### FIRST GROUND:

Even the casual reader of the decision rendered in this case would reach the conclusion that the "Selja"

is held at fault, because (to use the language of the decision itself) "the uncontradicted evidence shows that the 'Selja's' engines were not stopped until 3:15, fifteen minutes after her master had heard the first whistle of the approaching vessel" (p. 6). "Had the master of the 'Selja' stopped her engines when he first heard the whistle of the 'Beaver', practically right ahead, as he himself testified, or at almost any time thereafter during the ten or more minutes the 'Beaver' was sounding her whistle every fifty-five seconds, manifestly the collision could not have occurred" (p. 5). And were such casual reader advised that a mistake had been made in the court's finding of fact, and that the uncontradicted evidence, instead of showing that the engines were not stopped until 3:15, *one minute* before the collision, shows that they were stopped at 3:10, *six minutes* before the collision, when the vessels were approximately two miles apart; and that at the time of the collision the "Selja" was actually backing away from the approaching "Beaver"; he would probably be led to express the belief that the decision would be reformed so as to relieve the "Selja" from all fault contributing to the accident.

The mistake intimated has actually been made, and we are confident in our belief that the court will at least be prompt in its recognition and correction of this error, even though it may find that it does not affect its ultimate opinion as to liability.

We confess our inability to even suggest from what source or data the court has been led to make this error, and we furthermore fully appreciate the task

before us if we are to succeed in overcoming the natural disinclination of the court to approach anew a consideration of this case with so radical a change in the vital facts.

It is difficult to convincingly disprove a stated fact by merely averring a general negative; nevertheless, we feel pretty sure of our ground in the matter before us and, therefore, have no hesitancy in respectfully asserting that no word of the record in this case can be cited to support the court's finding that the "Selja's" engines were not stopped until 3:15, one minute before the collision; and in making this assertion we are fully mindful of the court's statement that this is the uncontradicted evidence of the case. Indeed, so sure are we of this fact that we go even further and affirm that the uncontradicted evidence is that the vessel's engines were not working *six minutes* before the collision, and that at the time of the impact she was backing away from the "Beaver". These were so conclusively the established facts that, in presenting our main brief, the rather unusual course was pursued of printing in red ink on the outside cover what we knew was to be the ultimate question for the court to decide:

"Is a vessel actually going astern at the time of collision liable for such collision merely because she failed to stop her engines until six minutes before the same, while the vessels were still about two miles apart?"

While our opponents did not expressly assent to the propriety of the foregoing question, the only direct

criticism of it is found at page 2 of their opening brief, where it is said:

“Not even the red ink foreword on the cover is a fair summary of the evidence as we understand it.”

Nevertheless, there is to be found thereafter no dispute of this “foreword” that would in any wise sanction a finding that the “Selja’s” engines were not stopped until 3:15. Indeed, the briefs on both sides are replete with references to the admitted fact that the engines were stopped at 3:10, and at page 28 of the main brief for the “Beaver” the following testimony of Capt. Lie is quoted to show that fact:

“Q. How long was it after 3:10 before you sighted the ‘Beaver’?

A. Five minutes.

Q. How were the engines going from 3:10 to 3:15?

A. Stopped.

Q. When did you stop them?

A. 3:10.

Q. What was the speed of the ‘Selja’ when you stopped the engine?

A. Three knots.”

Furthermore, a very large share of the record, for which our opponents are responsible, is devoted to the attempt to show that the “Selja’s” engines were stopped *before* 3:10, and that for many minutes before sighting the “Beaver” she was lying dead in the water, and was at fault for not blowing two whistles as signifying that fact. Neither the pleadings, the proof, nor the arguments, oral or written, so much as hint at what the court has now found to be the “uncontradicted” evi-



dence of the case. The fact that the "Selja's" engines were stopped at 3:10 was admitted at the outset, and never thereafter was that admission disturbed, although nearly half the trial was taken up with counsel's attempt to prove that they were stopped long before 3:10. Indeed, the only issue between us related to appellee's contention that the "Selja's" engines had been stopped long before 3:10, and that at 3:15, the time the two vessels sighted each other, she was, and had been for many minutes, lying dead in the water.

The libel reads:

"At 3:10 P. M. the 'Selja's' engines were stopped. At the time her engines were stopped she was making about three knots per hour."

(Record, Vol. I, p. 14.)

The answer of the "Beaver" to this allegation reads:

"Admits that at 3:10 P. M. the 'Selja's' engines were stopped; alleges that it is ignorant as to how long they had been stopped or as to their speed, if any, between 3:05 and 3:10 P. M., but in that behalf alleges that at 3:10 P. M. the Selja was *almost at a standstill* in the water; denies that she was making three knots per hour at 3:10 P. M., and in that behalf alleges that she was *almost at a standstill* as aforesaid."

(Id., p. 25.)

On the issue thus initially presented the case was tried: A *mutual* agreement that the engines were not working at 3:10 P. M., and an issue as to how long *before that time* they had been stopped. Fifty-two pages of appellee's main brief alone (pp. 96 to 148) are exclusively devoted to this issue, the argument being

that for a period extending from five to ten minutes before the collision the "Selja" was lying at a standstill. The court, quite properly we believe, paid no attention to this contention, and we refer to it only as showing that our opponents, instead of attempting to advance the novel position taken by the court, were on the contrary insistent that, at the hour of 3:15, the "Selja" had been dead in the water for many minutes, and that her failure to so advise the "Beaver" by blowing two whistles was the cause of the collision. Counsel for the "Beaver", as a closing summary to this contention, to which he devoted half a hundred pages of his brief, says:

"Whether he had been stopped for ten minutes \* \* \* or for a longer or shorter period, is immaterial. He should have blown two long blasts of his whistle as provided by Rule 16 (15), *and his failure to do so led Captain Kidston to believe that the 'Selja' still had way on and to adopt a maneuver which sent him directly into the 'Selja' instead of starboarding his wheel and clearing her bows, as he would have done if he had known she had stopped.*"

(Appellee's Opening Brief, p. 147.)

In other words, because the "Selja", before she was sighted and when the "Beaver" first heard her whistle, was at a standstill, and had been for some time, she should have blown two whistles; failing to do so Capt. Kidston was deceived by the whistle which was blown, and thought he could clear the unseen "Selja", assumed to be oncoming, by changing his own ship's course to starboard, and, in doing so, ran into the stopped "Selja". This was the "Beaver's" seriously urged contention in

both courts. It is true that it weakens, if it does not destroy, the "Beaver's" further contention as to the "Selja's" violation of the stopping requirement of Article 16, and it certainly is inconsistent with the contention that such violation was a contributory cause to the collision,—but this inconsistency was pointed out by us (Opening Brief, pp. 44-50).

Again we go so far as to say that it is doubtful whether there would ever have been any litigation over the question of liability for this collision, at least on our advice, if there had been proof that the "Selja" had not stopped her engines until one minute before the actual impact. At any rate it is evidence that, had there been the slightest possibility of such proof being made, our opponents would not have wasted their time in so strenuously attempting to establish the much less conclusive contention of a violation of the two whistle rule, a contention entirely ignored, as we thought it would be, by both this and the trial court.

We have already referred to the libel and the admission of the answer, but what of the proofs on the point before us?

Besides Capt. Lie's testimony, the vessel's first officer (off duty at the time) testified that before the "Selja's" three whistles were blown he had noticed that her engines were not running (Vol. I, p. 52), and that after the "Selja's" three whistles were blown her engines were started, and that the vessel had sternway before the impact (*id.* 54, 55).

Rambek Eggen, chief engineer (off duty at the time), says that in his room at about five minutes after three he heard the engine room bell, which slowed the "Selja's" engines, and that about five minutes after that the stop bell was rung, and the engines were stopped (id. 67, 68).

On the day after the collision the chief engineer prepared and signed, with the second and third engineers, the engine room log for November 22nd (id. 70), which was introduced in evidence as Libelant's Exhibit 1. The following is an extract from this log:

"At 1 P. M. there was telegraphed half speed and then proceeded with about 40 revolutions until 3:05 P. M. when slow speed was ordered and at 3:10 stop. At 3:15 full speed astern was ordered \* \* \*."

(Vol. IV, p. 1452.)

The vessel's second engineer (off duty at the time) testified that he heard the stop bell and felt the engines stop some minutes before he heard the "Beaver's" whistle on the port bow (Vol. I, pp. 93, 94); that when he saw the loom of the "Beaver" he rushed down into the engine room, but first looked over the side of his own ship and found that she was working astern,—the back water from her propeller was going forward along the side of the vessel; and that when he reached the engine room he found the engines working astern, and that then the shock came (id. 95).

Arvid Bjorn, the "Selja's" third officer, on duty on the bridge with Capt. Lie, testified that the "Selja's" engines were stopped by the captain at ten minutes past



three; he looked at the clock when the stop order was sent by telegraph (id. 115, 116).

Pedar Hansen, the "Selja's" third engineer, on duty at the time, testified that after getting the slow bell at 3:05 he got the stop bell at 3:10, and the full speed astern bell at 3:15; and that all of these orders were immediately executed (id. 127, 128).

Furthermore, all the "Selja's" deck officers signed the ship's log for November 22nd, made out the day after the collision, and in this log we find the following entry:

"At 3.5" P. M. ordered slow speed as we heard the whistle nearing, and 3.10 stopped the engine, the vessel being then nearly at a standstill. At 3.15" saw the contour of the other vessel and we then ordered full speed astern."

(Vol. IV, p. 1453.)

There was no cross-examination of these officers of the "Selja" that in any way affected their testimony as to the time the vessel's engines were stopped, and her backward movement at the time of the collision. Not only did Capt. Lie add his testimony to that of the other officers of the "Selja", in the establishment of this latter fact, but Capt. Kidston, master of the "Beaver", volunteered the admission of the same fact:

"A. After we hit that ship we remained in that hole I suppose for maybe five or six seconds, maybe a little longer; it seemed longer to me but it might not have been any longer. The 'Selja' was backing at the time——

Q. (intg.) At the time you hit her?

A. At the time we hit her she was backing. It seemed to me that for the time we remained in that



hole that we penetrated in her side, that the 'Selja' in backing had pulled us around a bit with her, had pulled our bow around with her as she was backing, so that when we came out of the hole we came out at a little bit more of an angle than we went in."

(Vol. III, pp. 907, 908.)

The wireless operator on the "Beaver" said that when he first saw the "Selja" she was a good ship's length and a half or two away, and she was neither going forward nor astern, and he remarked to a passenger:

"Why don't the damn fool go ahead or astern. Look at him, he is standing still."

(Vol. IV, pp. 1112, 1113.)

Furthermore, the lower court's decision is based upon the fact that the engines of the "Selja" were stopped at 3:10 P. M. (Vol. IV, p. 1393).

We respectfully submit that the admitted fact of the pleadings, that at 3:10 the vessel's engines were not working, is as clearly shown by the record as is the fact that the "Beaver's" speed was immoderate.

As we have said, we presented our written argument knowing that the ultimate question to be decided was whether it could be said that a vessel had contributed to a collision, which had stopped her engines six minutes before the same, and at the moment of impact was backing away from the point of the intersection of the courses. Quite naturally this question has not been considered by the court, for the reason that, under the facts erroneously found, a vessel proceeding at three

knots, or even approximately at that speed, one minute before the collision, could not very well have checked her speed so as to have been moving backward at the time of the collision. With the erroneous finding of the court in mind we can quite easily appreciate the unfavorable estimate of Capt. Lie's veracity, when he testified that at 3:15 he thought the "Selja" was making practically no headway (Decision, p. 5).

As bearing on the vital significance of the court's erroneous findings, we call attention to that part of its decision where it is said that "manifestly the collision could not have occurred" had Capt. Lie stopped his engines at almost any time after hearing the first whistle, during the ten or more minutes that the "Beaver" was sounding her whistle every fifty-five seconds. This, as the court must now see, is precisely what Capt. Lie *did do*, and yet the collision *did* occur. We respectfully suggest that what the court meant when it said it could not occur was that the collision could not have occurred through the contributory fault of the "Selja", for, of course, even though the maneuvers of one vessel may be above criticism, they are not necessarily a preventative against the result of the reckless maneuvers of another vessel. The opinion of the court, that, if Capt. Lie had stopped earlier than one minute before the collision, it could not have occurred, because "at the rapid and unlawful speed at which the 'Beaver' was going she would necessarily have passed the point of collision", would clearly have found verification in the circumstances of this collision but for one addi-

tional fault on the part of the "Beaver"—a fault arising out of a fact, which, the court will doubtless remember, was not only shown by the evidence but admitted by counsel. And that is this: Before sighting the "Selja", and after hearing her whistle, the "Beaver's" master *changed his vessel's course*. As we have said, this fact is clearly established, and counsel admits it when, at page 147 of appellee's opening brief, he says that Capt. Kidston was led by the "Selja's" one whistle "to adopt a maneuver which sent him directly into the 'Selja' ". If Capt. Kidston had kept his course the court's opinion that the "Beaver" "would necessarily have passed the point of intersection" would have found verification, but the "Beaver's" reckless departure from her course, and her actual pursuit of the retreating "Selja", necessarily led to a collision, not at a point on the line of the "Beaver's" original course, as seems to be assumed by the court, but at a point on a divergent line leading directly towards a course which the "Selja" was pursuing backward away from the forward moving "Beaver". Capt. Kidston admits that had he not made this mistake of putting his wheel hard-a-port, and thereby directing the "Beaver's" course to starboard, the collision would not have occurred:

"Q. And yet if you had not done it there would have been no collision?

A. If I had kept my helm to starboard I don't believe there would have been any collision."

(Vol. III, p. 903.)

That the "Beaver" followed up and ran down the retreating "Selja" was called to the court's attention at page 39 of our main brief.

An assumed similar situation undoubtedly was the cause of the emphatic language of the Circuit Court of Appeals in the *St. Louis* case (98 Fed. 750):

“Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the *St. Louis* was not going at a moderate rate of speed, it cannot be held that the failure of the Delaware (in violating the rule as to stopping) was contributory to the collision.”

Such a situation has been clearly proven in this case, and, indeed, has been admitted by Capt. Kidston of the “Beaver”. Such a situation was the cause of the unusual red ink foreword printed on the cover of our brief, but it is a situation made impossible under the court’s erroneous conception of the time the “Selja’s” engines were stopped, and, therefore, it was not and could not have been passed upon by it. The situation proceeds on an assumed violation of Rule 16 by the “Selja” and, therefore, bears solely on the question of that vessel’s contributing negligence.

In view of what this court has said was *manifest*, had the “Selja” stopped her engines at an earlier time than one minute before the collision; in view of the fact that she did so *six minutes* before the collision; in view of the fact that at the time of the collision she was backing, and that in order to strike her the “Beaver” had to deviate from her original course, which she recklessly did before sighting the “Selja”; and in view of Capt. Kidston’s frank admissions; we respectfully submit that the case be considered anew that full and complete



justice may be done, to the end that litigation of this magnitude may not pass into final judgment upon an erroneous conception of vital facts, upon which hinges the all-important question of the "Selja's" contributory negligence, and more especially do we urge this petition since the cause for the present unfortunate situation, we respectfully submit, cannot be attributed to any lack of presentation on our part, as may readily be seen from the record.

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## SECOND GROUND:

The remaining grounds in support of this petition may be more briefly presented. The principles they bear upon are of little importance under the findings of the present decision. They become of immense importance, however, when considered in the light of these findings when they shall have been corrected to conform to the record.

The so-called rule of *The Pennsylvania* case reads as follows:

"The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship to show not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

19 Wall. 136 (22 L. Ed. 151).



Much time was taken up in both the lower and this court over our contention as to the construction of this rule. Both courts, however, make the same mistake, we respectfully submit, in stating the rule, for it is said that

“The law is that when a vessel has committed a positive breach of a statutory duty she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.”

(Judge Bean’s decision, Vol. IV, p. 1397; this court’s decision, p. 7.)

It will be seen from our briefs that we pointed out to the court that such a construction broadens beyond all reason the rule aforesaid, which has already been characterized by a court enforcing it as “*mechanical and arbitrary*.” And, indeed, this court has recently affirmed (190 Fed. 475) a decision of Judge Wolverton (*The Europe*, 175 Fed. 596), wherein this learned judge says:

“A vessel in collision is presumed to be in fault *if, at the time*, it was acting in violation of a statutory rule intended to prevent the occurrence.”

As is shown in the case of *The Europe*, the Pennsylvania rule is limited to a breach existent “at the time of the collision”,—it is not applicable to a breach which a vessel *has committed*, but to one which *is being committed*. Whether the “Selja’s” breach of Article 16, six or more minutes before the time of the collision, could be said to bring her within the rule can, for the moment, be set aside. The question first is: Does the burden of proof rule apply, irrespective of the time of the collision? For instance, could it be said to apply to a steamer in a fog which, an hour before the collision,

blew a horn instead of a steam whistle, although at the time of the collision she was blowing the steam whistle? Obviously not, and we do not believe this court intended to lend its sanction to such a construction. There must be some relation in time between the breach and the collision. The rule itself says it must be "at the time of the collision", but we concede there may be breaches which ought not to be literally so restricted. If, in a fog, a sailing vessel should be blowing a fog horn not operated by mechanical means, as required by law, that would be a breach at the time of the collision, which would unquestionably bring into operation the burden of proof rule. If a vessel is sailing at night without regulation lights, and a collision occurs, that would be another illustration.

As we have pointed out in our main brief, the test should be that if a vessel violates a rule, and the violation can possibly be said to be not overcome at the time of the collision, then the Pennsylvania burden of proof rule applies (main brief, p. 121). Applying such a test to the "Selja's" violation of Article 16, it is obvious that the effect of her violation of it had been overcome at the time of the collision, *if*, at that time, she was moving backward from the natural point of the intersection of the original courses of the two vessels. The applicability or non-applicability of the Pennsylvania rule is, therefore, seen to be necessarily connected with the time of the stoppage of the "Selja's" engines, for upon this fact in turn depends the question of whether her movement was forward or backward at

the time of the collision. As the court has erroneously found the first fact, which makes impossible the second, it follows that there has been no right consideration in the present decision of the applicability of the Pennsylvania rule. As the decision now stands we admit that the "Selja" was in the actual violation of Rule 16 at the time of the collision, and, therefore, the rule is applicable. But the inquiry should be: *Is the rule applicable under the true facts of the case?* This, we respectfully submit, the court has not passed upon.

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### THIRD GROUND:

As we have already pointed out in the argument of the first ground for the granting of this petition, had the "Beaver" kept her course there could have been no collision, for she would have safely passed the natural point of collision where the two courses would have intersected, because the "Selja" was moving backward and away from such point. The present decision, however, proceeds on the theory that the "Selja" could not have been backing, and also that the collision occurred at the intersection of the original courses. Discussing our contention as to the non-contributing fault of the "Selja", and applying the burden of proof rule of *The Pennsylvania* case, the court says:

"So far from the Selja having sustained that burden, it is perfectly apparent that had she observed the statutory rule, or even the rule of good seamanship, the Beaver would necessarily, as has

already been observed, have passed the point of collision before the Selja could have reached it.”\*

(Decision, p. 8.)

The question which we now raise is: Has the court applied to this case the proper test of contribution, when it says that “it is perfectly apparent that had she (the ‘Selja’) observed the statutory rule, or even the rule of good seamanship, the ‘Beaver’ would necessarily have passed the point of collision before the ‘Selja’ could have reached it”. Suppose, instead of stopping at all, the “Selja” had increased her speed, in violation of the first part of Article 16, then the two vessels would not have reached the point of collision at the same time, and one would be forced to the conclusion that, because the “Selja” had *violated* Article 16, she had thereby avoided a collision. Surely, such a test could not be the proper one to apply to the principle of contributory negligence, and we can do no better than reiterate the condemnation of such test made by the Supreme Court of the United States:

*“It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may or may not reach the point of intersection at the same time, but by*

---

\* Note. Of course, if the “Selja” was backing, it would not be accurate to say that she had “reached” the point of collision. Such expression more properly conveys the idea of progress, not retrogression. The “Selja’s” part in the collision, if she was backing, was one of continuing activity taking her away from collision.



*the question whether their speed can be stopped before their arrival at the point where the courses intersect."*

*"If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible."*

*The Umbria*, 166 U. S. 404; 41 L. Ed. 1053;

(See Appellant's Opening Brief, p. 98.)

In the case of *The Cascades*, 178 Fed. 726, decided by Judge Wolverton, and *affirmed by this court* in October, 1911 (190 Fed 729), this rule of the *Umbria* case is quoted in full with approval.

Again, in the case of *The Belgian King* (125 Fed. 869), this court, after citing both parts of Article 16, lays down practically the test of *The Umbria* case, when it says:

*"The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed, before she could collide with a vessel which she could see through the fog."*

And in the briefs of distinguished counsel for the *Tellus* in that case the rule of *The Umbria* case is referred to several times, while distinguished counsel for *The Belgian King* unsuccessfully raised in his brief the identical argument against the applicability of the *Umbria* rule that has been raised by counsel in this case:



Article 16 was not in force at the time of the *Umbria* decision, etc. It was in force when *The Cascades* was decided, and when *The Belgian King* was decided.

Furthermore, the test of contribution, as laid down by the Supreme Court, is founded on logic and sound sense, and does not depend upon the question of whether a certain rule is or is not in force. To say that when a steamer is running in a fog at such a speed that no maneuver on the part of another can prevent the first from passing the point of intersection of their two courses, the latter only is responsible for an ensuing collision, is to state a principle governing the rule of contributory negligence in collision cases that will remain unaffected by rules governing the maneuvers of vessels in fogs for long to come, because it is both equitable and sound. Why should such an equitable principle be affected by the subsequent adoption by Congress of Article 16,—an article that, as was said by the Circuit Court of Appeals in *The Umbria* case,

“merely formulates the duty which nautical experts had found it necessary to observe, and which the courts had often declared obligatory” (53 Fed. 291).

The principle that will hold to sole liability any vessel, whose speed in a fog is such that she cannot be prevented from passing the danger point (the intersection of the two courses) by anything the other vessel may do, whether in obedience to statutory rule or good seamanship, appeals to us as one which will still receive the Supreme Court’s stamp of approval, as it has on at least two occasions received the approval of this court since the adoption of Article 16.

**FOURTH GROUND:**

The major and minor fault rule is an old one, and undoubtedly has often been applied by this court, and we are free to admit its inapplicability to the facts of the case under the erroneous findings of the present decision. If the "Selja" did not stop her engines until one minute before the collision, such fault would unquestionably have placed her on a plane with the reckless "Beaver", and would have made inapplicable the rule in question. The court must see, however, the vital change in the whole case made by rectifying the finding as to when the "Selja's" engines were stopped. It makes possible the evidence of the "Selja's" officers as to the backward movement of the "Selja", as well as the admissions of Capt. Kidston to that effect, to say nothing of the applicability of our expert testimony establishing the same fact. To consider the case with a finding that the engines were stopped six minutes before the collision makes it appropriate for this court to do what was not before necessary or appropriate, namely: to consider our brief on the question of the applicability of the major and minor fault doctrine (Opening Brief, p. 107).

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**CONCLUSION.**

We frankly confess that our best hope of success in presenting this petition lies in the belief that the court will see the inequity of permitting the case to stand concluded upon an error of fact so vitally at variance with, as well as foreign to the record, as to bring to naught the labor and effort which have fallen to counsel in the

case's presentation, to the end that the court's consideration of it might be simplified and helped. To deny appellant a consideration of this appeal upon the established hypothesis that the "Selja's" engines were not working at 3:10, and that at the time of the collision, six minutes later, the vessel was backing away from the "Beaver", would permit of an undeserved reproach upon our efforts, which we know this court would not consciously be a party to.

Furthermore, it must be obvious that with this case considered in the light of the "Selja's" engines working until one minute before the collision, and only being stopped after the vessel had entered the very "jaws of the collision", all consideration of contributory negligence, burden of proof and the doctrine of major and minor faults became unnecessary, and could not with profit be considered.

We believe this court knows that had its decision, even though adverse to us, shown a consideration of the vitally and clearly established facts bearing on the subject of the "Selja's" contributory negligence, we would have been loath to accord it anything less than respectful acquiescence, subject of course to such rights of review as our client might have.

Dated, San Francisco,

January 30, 1915.

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellant and petitioner in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

E. B. McCLANAHAN,

S. H. DERBY,

*Of Counsel for Appellant  
and Petitioner.*

United States  
Circuit Court of Appeals

For the Ninth Circuit.

HENRY M. WHITE, Commissioner of Immigration  
at Seattle, Washington, for the United  
States Government,

Appellant,

vs.

K. GREGORY, M. ALOSHIN, I. RIABOFF, P.  
NEALIN, I. EMELIN, L. ORLOFF, G.  
YAKIMOFF and P. YAKIMOFF,

Appellees.

In the Matter of the Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, G. YAKIMOFF  
and P. YAKIMOFF, for a Writ of Habeas  
Corpus.

Transcript of Record.

Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

FILED

MAR 16 1914





No. 2378

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United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY M. WHITE, Commissioner of Immigration  
at Seattle, Washington, for the United  
States Government,

Appellant,

vs.

K. GREGORY, M. ALOSHIN, I. RIABOFF, P.  
NEALIN, I. EMELIN, L. ORLOFF, G.  
YAKIMOFF and P. YAKIMOFF,

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M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 2646.

In the Matter of Application of K. GREGORY, M.  
ALOSHIN, I. RIABOFF, P. NEANLIN, I.  
EMELIN, L. ORLOFF, G. YAKIMOFF and  
P. YAKIOFF, for a Writ of Habeas Corpus.  
HENRY M. WHITE,

Respondent and Appellant.

K. GREGORY, M. ALOSHIN, I. RIABOFF, P.  
NEANLIN, I. EMELIN, L. ORLOFF, G.  
YAKIMOFF and P. YAKIOFF,  
Petitioners and Appellees.

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and Appellees, Room 221 Lyon Building, Seat-  
tle, Washington. [1\*]

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\*Page number appearing at foot of page of original certified Record.

FOURTH: That all your petitioners were born in Russia, that they have left Russia with their own free will, and not by any reason that they have committed any offense against the laws of Russia and that they are coming here in hopes of bettering their conditions under the beneficent laws of the U. S.

FIFTH: That they have paid their transportation to the U. S. with their own money. [3]

SIXTH: That your petitioners are not held by said Immigration Commissioner upon any final process issued by a Court of common jurisdiction, nor held upon any process, or order for any contempt of any court, officer, or body having authority to commit or hold them, nor upon any warrant issued by any court of this State, upon indictment, or information in this State, nor is there any lawful or valid reason for detention of your petitioners.

SEVENTH: Your petitioners are held by the said Immigration Commissioner upon the alleged grounds as follows, to wit:

FIRST: That there are many Russians in the city of Seattle out of work.

SECOND: That they might become a public burden, but your petitioners aver that they are able to secure and save harmless the U. S. from any damage of any kind or nature whatsoever, arising from inability of your petitioners to support and take care of themselves and that they are amply able and willing and intend to be good and self-supporting residents of the U. S.

WHEREFORE, your petitioners pray—

FIRST: A writ of habeas corpus issue out of this

court directed to H. M. White, the said Immigration Commissioner in whose custody your petitioners now are, commanding and requiring said H. M. White to have the bodies of your petitioners before this court on some special and convenient day to be determined by this Court, then and there to show cause why these petitioners are detained of their liberties, and why they should not be forthwith and immediately discharged from said custody.

SECOND: That the pending of return of this writ at the date so to be fixed by this Court to assure their appearance at the said return day. [4]

THIRD: That your petitioner be discharged from said custody; that they have such other and further relief as this Court may seem just.

(One name cannot read)

K. GREGORY.

M. ALOSHIN.

I. RIABOFF.

P. NEANLIN.

I. EMELIN.

L. ORLOFF.

G. YAKIMOFF.

P. YAKIOFF.

Subscribed and sworn to before me this 12th day of January, 1914.

[Seal]

JACOB KALINA,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Indorsed: Petition of Gregory et al. for Habeas Corpus. Filed in the U. S. District Court, Western

Dist. of Washington, Northern Division. Jan. 12, 1914. Frank L. Crosby, Clerk. By \_\_\_\_\_, Deputy. [5]

---

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 2646.

Petition for Writ of Habeas Corpus of K. GREGORY et al.,

Petitioners.

**Appearance [of Attorneys for Petitioners].**

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for petitioners in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said petitioners by leaving the same with,

PARKER & KALINA,  
Office Address, 221 Lyon Bldg.,  
Seattle, Washington.

[Indorsed]: Appearance. Filed in the United States District Court, Western District of Washington, Jan. 12, 1914. Frank L. Crosby, Clerk. By \_\_\_\_\_, Deputy. [6]



**[Order Directing Issuance of Writ of Habeas  
Corpus.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 2646.

In the Matter of the Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, C. YAKIMOFF  
and P. YAKIMOFF, for Writ of Habeas  
Corpus.

This cause coming on to be heard upon the applica-  
tion for a writ of habeas corpus, and the Court being  
well and sufficiently advised in the premises, it is  
ordered that a writ of habeas corpus issue by the  
Clerk of said court as prayed for in said application,  
returnable on the 17th day of January, at the hour  
of ten o'clock on said day, before the undersigned  
Judge of said Court, at its court-room usually oc-  
cupied by him.

Dated this 12th day of January, 1914.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District  
Court, Western District Court, Western District of  
Washington, Jan. 12, 1914. Frank L. Crosby, Clerk.  
By —————, Deputy. [7]



**[Writ of Habeas Corpus.]**

*United States District Court, Western District of  
Washington.*

The President of the United States of America, to  
H. M. WHITE, Commissioner of Immigration,  
Greeting:

We command you, that you have the bodies of K. Gregory, M. Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, C. Yakimoff and P. Yakimoff; by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said K. Gregory, M. Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff shall be called or charged, before the Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, at Seattle, Washington, in the Northern Division of said Western District of Washington, on the 17th day of January, 1914, A. D., at ten o'clock in the forenoon, to do and receive what shall then and there be considered concerning the said K. Gregory, M. Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff.

And have you then and there this writ.

WITNESS the Hon. JEREMIAH NETERER,  
Judge of the United States District Court for the  
Western District of Washington, this 12th day of

January, in the year of our Lord one thousand nine hundred and fourteen.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed M. Lakin,

Deputy Clerk.

J. KALINA, Esq.,

Attorney for Petitioner. [8]

RETURN ON SERVICE OF WRIT.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named H. M. White, Commissioner of Immigration, by handing to and leaving a true and correct copy thereof with John H. Sargent, Acting Assistant Commissioner of Immigration personally, at Seattle, in said District on the 12th day of January, A. D. 1914.

JOHN M. BOYLE,

U. S. Marshal.

By Wm. D. Downey,

Deputy.

Marshal's fees: \$2.18.

[Indorsed]: Habeas Corpus. Filed in the U. S. District Court, Western District of Washington, Northern Division, Jan. 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [9]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 2646.

In the Matter of the Petition of K. GREGORY, M.  
ALOSHIN, I. RIABOFF, P. NEANLIN, I.  
EMELIN, L. ORLOFF, G. YAKIMOFF,  
and P. YAKIOFF, Aliens, for a Writ of  
Habeas Corpus.

**Return to Petition and Writ of Habeas Corpus.**

To the Honorable Judge JEREMIAH NETERER,  
Judge of the Above-entitled Court:

Comes now Henry M. White, Commissioner of Immigration, at Seattle, and for answer to the writ of *habeas corpus* issued herein, and for answer to the petition filed herein, for said writ, states as follows:

I.

That he denies each and every allegation set forth in the petition for said writ, save and except what is hereinafter specially admitted.

II.

That he admits the allegations set forth in the first paragraph of the petition ending at the words "Commissioner of Immigration."

III.

As to allegations set forth in the second paragraph, he admits those ending at "twenty years of age," in line eleven.

As to the rest of the allegations in said paragraph, he [10] has not knowledge and information there-

of sufficient to form a belief and therefore denies the same.

#### IV.

As to the allegations set forth in the third paragraph, he admits those ending at the words "free will," in line eighteen; and as to the other allegations set forth in said paragraph, he has not knowledge and information thereof sufficient to form a belief and therefore denies the same.

#### V.

As to the allegations set forth in the fourth paragraph, he admits those ending at the word "Russia" in line twenty-three; and as to the matter set forth in line twenty-four of said paragraph, he has not knowledge and information thereof sufficient to form a belief and therefore denies the same.

#### VI.

As to the allegations set forth in the fifth paragraph, he has not knowledge and information thereof sufficient to form a belief and therefore denies the same.

#### VII.

As to the allegations set forth in the sixth paragraph, he admits that the petitions are not held upon process issued by a United States or State Court; alleges that there is a valid and lawful reason for the detention of your petitioners, as hereinafter appears by the affirmative matter set forth in the separate answer.

#### VIII.

As to the allegations set forth in the seventh paragraph, he denies each and every allegation thereof,



save and except what may be admitted by the matter set forth in the separate answer hereinafter appearing. [11]

AND FOR A FURTHER AND SEPARATE ANSWER AND RETURN TO SAID APPLICATION FOR A WRIT OF HABEAS CORPUS, AND FOR FURTHER RETURN TO SAID WRIT, SAID HENRY M. WHITE ALLEGES AS FOLLOWS:

I.

That the above-named petitioners are aliens and are Russians, and arrived on December 19, 1913, or a few days prior thereto, on the steamship "Tamba Maru," at the port of Seattle, King County, Washington, and made application for admission to the United States.

II.

That according to the law, they were held for special inquiry by the Immigrant Inspector, and a Board of Special Inquiry, consisting of T. W. Lynch, J. E. Wilkes, and A. T. White, was appointed in the manner provided by Section 25 of the immigration act of February 20, 1907, and duly convened and met in the manner provided by law, on December 23, 1913.

III.

That on December 23, 1913, after a full hearing (a duplicate report of which appears in the Immigration files of this cause and is marked Exhibit "A" and made a part of this Return), the Board decided to reject the aliens on the ground that they were persons who were likely to become a public charge, for the following reasons:



FIRST: Because they are common or farm laborers and there is not work for them in the United States.

SECOND: Because they have but a limited amount of money, insufficient to maintain them [12] during the winter.

THIRD: Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the Interior are to the effect that the supply of common labor is far in excess of demand.

FOURTH: That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time.

For a fuller statement of the reasons for the exclusion of these aliens and their subsequent detention on this account until they are returned to their native country, we refer to the findings of the Board of Special Inquiry, set forth in full on the last pages of Exhibit "A," referred to above.

#### IV.

That the above petitioners and aliens appealed to the Secretary of Commerce and Labor, and the said Secretary affirmed the decision of the Board of Special Inquiry by a decision rendered solely upon the evidence adduced before the said Board. That the decision was adverse to the admission of the said petitioners and aliens and his action, and that of the Board, as above set forth, are correct and final on this subject.

Wherefore, said Henry M. White prays the above-entitled Court that the said writ be dismissed and the application and petition therefor be denied. [13]

The United States of America,  
Northern Division,  
Western District of Washington,—ss.

Henry M. White, being first duly sworn, upon his oath deposes and says: That he is the party named in the foregoing answer; that he has read the same, knows the contents thereof and verily believes the same to be true.

HENRY M. WHITE.

Subscribed and sworn to before me this 16th day of January, 1914.

[Seal] ED M. LAKIN,  
Deputy Clerk, U. S. Dist. Court, Western Dist. of  
Washington. [14]

**[Exhibit "A" to Return to Petition and Writ of  
Habeas Corpus.]**

U. S. DEPARTMENT OF LABOR.

Bureau of Immigration.

53618/42 Washington.  
Exhibit A. January 10, 1914.  
Immigration Service,  
Seattle, Wash.

\*Dedicant Jakob Orloff and two companions and  
Gregori Kornilin and five companions.

LARNED.

---

Attest:

CTH.

Acting Commissioner-General.

---

\*Secretary (or Acting Secretary) has affirmed excluding decision board and directs deportation.

U. S. Immigration Service.

Received Jan. 14, 1914, Seattle, Wash.

(Two time clocks.)

\* \* \* \* \*

The above is an official copy of telegram sent this day.

F. LARNED,

Acting Commissioner General.

Meaning of Code Word Dediant.

JOHN H. SARGENT,

Actg. Commissioner. [15]

TELEGRAPH COMPANY.

Clarence H. Mackay, President.

TELEGRAM.

Received at Main Office

Delivery No. 71.

Postal Telegraph Building

723 First Ave., Cor. Columbia,

Seattle, Wash.

Tel. Main 2043; Elliott 1405.

The Postal Telegraph Cable Company  
(Incorporated) transmits and delivers this  
message subject to the terms and conditions  
printed on the back of this blank.

Design Patent No. 40529.

U. S. Immigration Service.

Received, Jan. —, 1914. (Two time clocks.)

Seattle, Wash.

76 sfx 17 Govt.

Br Washington D C. Jan 10 1914

Immigration Service,

Seattle, Wn.

Dedicant jakob orloff and two companions and  
Gregori Kornilin and five companions.

LARNED.

This message phoned at 9:35 to S EP  
932 am [16]

Postal.

Immigration, Washington, D. C.

December 27, 1913.

Appeal record nine Russians mailed Bureau  
twenty-third. Renvoy. Friends and relatives filed  
affidavits agreeing care for until get work and not  
permit become public charges. Affiants laboring men  
with from one to three hundred dollars.

WHITE.

Attest:

(Signed) HENRY M. WHITE,

Commissioner.

PHONED.

(Signed) HENRY M. WHITE.

Exact copy as signed by Henry M. White.

Mailed Dec. 27, 1913, by F. J. A. [17]

No. 4223/22.

December 23, 1913.

Commissioner-General of Immigration,

Washington, D. C.

I have the honor to transmit herewith for con-  
sideration the record on appeal in the cases of  
Gregori Kornilin, Noisei Alioshin, Ivan Riaboff,  
Jakob Ephimoff, Peter Neonilin and Ivan Emelin,  
ex SS. "Tamba Maru" December 19, 1913, who have  
been excluded by a Board of Special Inquiry as per-  
sons likely to become public charges.

The circumstances under which they arrived and

the reasons for rejection are fully set out in the finding of the Board, in which I concur. These cases should be considered in connection with the cases of three other aliens ex same vessel same date, which are also being forwarded by this mail.

These aliens have sufficient funds to enable them to return from Yokohama to their homes in Russia and I recommend that the appeals be dismissed and that they be ordered returned to Japan at the expense of the importing vessel.

Sailings December 30th and fortnightly thereafter.

(Signed) JOHN H. SARGENT,

Act. Commissioner.

Exact copy as signed by John H. Sargent.

TWL/S.

Mailed Dec. 23, 1913, by F. J. A.

(Icnl.) Red Slip. Sec. 4223/23. [18]

Case No.

Gregori Kornilin,

Moisei Alioshin,

Ivan Riaboff,

Jakob Ephimoff,

Peter Neonilin, EXHIBIT A.

Ivan Emelin.

S. S. "Tamba Maru,"

December 19, 1913.

Excluded 12-22-13.

L. P. C.

6—————6 [19]



**[Report of Board of Special Inquiry.]****UNITED STATES DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.**

Seattle, Washington, December 20, 1913.

In re Cases of GREGORI KORNILIN, MOISEI  
ALIOSHIN, IVAN RIABOFF, JAKOB  
EPHIMOFF, PETER NEONILIN, and  
IVAN EMELIN.

Ex SS. "TAMBA MARU," December 19, 1913.

At a Meeting of the Board of Special Inquiry, Con-  
vened Pursuant to the Instructions of the Com-  
missioner, Composed of Inspectors T. W. Lynch  
(Chairman), J. E. Wilkes, and A. T. White.

Stenographer—Trent Doser.

Interpreter—Henry G. Gerome.

Held for Special Inquiry by Inspector A. T.  
WHITE as L. P. C.

**[Testimony at Meeting of Board of Special Inquiry.]****[Testimony of Gregori Kornilin.]**

Alien sworn, testified as follows: Name is Gregori Kornilin; Russia; Russian; male, aged 28 years; married; reads and writes; farm laborer; last permanent residence, Simbirsk, Krasnoie, Russia; nearest relative in Russia, father, Ivan, Kornilin, Simbirsk, Krasnoie, Russia; destined to Vancouver, Canada, but they would not let me land so I want to go to Portland, Oregon; has cousin, Pavel Semeionoff, care of Stancheff Brothers, 73 North Third Street, Portland, Oregon; ticket to Vancouver via Victoria; \$65.00 in gold; paid own passage; never in the United States.

Q. Have you a passport?

A. Yes. (Presents passport dated November 24, 1913, issued at Valdivastok, Russia, permitting the bearer to leave Russia.)

Q. When did you leave your home in Russia?

A. On the 17th of October I left my village.

Q. Where did you start for?

A. I wanted to go to Canada.

Q. Did you buy a ticket direct to Canada from your home?

A. I bought my ticket in Japan.

Q. When you left your home in Russia did these eight other boys who are on this boat leave at the same time with you?

A. We all left together from the same village.

Q. All going to Canada?      A. All to Canada.

Q. Why didn't you get your passport before you left home? (Interpreter explains that all passports are issued at Valdivastok and all applicants appear there for same.)

Q. Have you any relatives in Canada?

A. I have a second cousin.

Q. How did you happen to decide to go to Canada?

A. The reason I wanted to go to Canada was because we all received letters from Canada stating that they were doing well there and that we had better come over here too.

Q. Did you receive any letters from Portland?

A. Same thing.

Q. Did he say he was doing well too and asked you to come over?

A. He says [20] times are very good here and

said you can get work here easy.

Q. Why did you want to go to Canada instead of the United States?

A. We understood it was nearer and also that they did not request any money to be shown.

Q. Why did you not land in Canada?

A. We didn't know why; they would not let us.

Q. What did they tell you?

A. No more people are allowed to enter because there are too many out of work here.

Q. How long since you had a letter from your cousin in Portland?

A. I received a letter about the first of October.

Q. Have you that letter with you?     A. No.

Q. That man in Portland is a real blood cousin, is he?

A. He is my cousin; my father and his father are brothers.

Q. Have you any work promised you in this country?     A. He says you can get plenty of work.

Q. Did he say he had a position for you—a job?

A. No, he didn't say anything of that sort.

Q. Have you ever been in any charitable or penal institution?     A. No.

Q. Do you believe in polygamy?     A. No.

Q. Do you belong to any societies?     A. No.

Q. Do you believe in organized government?

A. I believe in law.

Q. Do you believe that the form of government now existing in Russia is all right?

A. The form of government is all right but somehow we have not got enough land.

Q. Do you believe in killing the officers because they are government officers?

A. No, we could not do that.

Q. Do you believe in the teachings of the anarchists and annihilationists of Russia?

A. I do not know what anarchists are.

Q. Did you ever hear of people who are banded together and throw bombs and try to kill the officials of Russia?

A. I have not heard of it and I do not believe in it.

Q. What would you do if you were landed in this country.

A. I will get a rooming-house and then look for work.

Q. What kind of work do you think you could do?

A. I can do all the farm work.

Q. You are not familiar with farm work as it is done in this country, are you?

A. I have an idea that it is about the same.

Q. Have you ever applied for admission to the United States before?     A. No.

Q. And the only kind of work you can do is farm labor?

A. No, besides farm labor I understand common labor too.

Q. What kind of work did you do in Russia other than ordinary farm labor?

A. I worked in the woods and I worked in the mines at spare times.

Q. What kind of mines?     A. Coal mines.

Q. There is no one else in the United States you know except the man in Portland?



A. No. Oh, there is a lot of others, about twenty friends around Portland, but no relatives.

Q. You don't know their names or addresses?

A. They all work in the same place and they all live in the same place.

Q. (By Inspector WILKES.) Have you got anyone dependent upon you for support in Russia?

A. I have a wife and two children. They do not have to rely upon me for support; my father and brother could support them if I could not.

Q. What wages do you expect to earn in the United States?

A. I do not know, I think about a couple dollars a day. [21]

Q. Are both of your children in Russia?

A. Yes, sir.

Q. (By Inspector LYNCH.) Have you any property in Russia?

A. Yes, I have a house and nine acres of land. I can get about \$800 for it.

Q. Your cousin in Portland, what is his business?

A. He works on a railroad in the woods.

Q. He has no property that you know of?

A. I don't know he only lives here a year.

The applicant is an ignorant peasant of average intelligence and of good physique.

### **[Testimony of Moisei Alioshin.]**

MOISEI ALIOSHIN, sworn, testified as follows: Name is Moisei Alioshin; Russia, Russian; male, aged 38 years; married; reads and writes; farm laborer; last permanent residence, Simbrisk, Krasnoie, Russia; nearest relative in Russia, wife, Axinia,



residing at Simbirsk, Krasnoie, Russia; destined to Vancouver, Canada, but they would not let me land so I want to go to Portland, Oregon; has no relatives in U. S.; ticket, produces order for passage from Victoria to Vancouver; money, \$46.00; paid own passage; never in the United States.

Q. Have you a passport?

A. Yes. (Presents passport dated November 24, 1913, issued at Valdivastok, Russia, permitting the bearer to leave Russia.)

Q. When did you leave your home in Krasnoie?

A. About the first of November, 1913.

Q. And you bought a ticket to where?

A. I bought my ticket from my village to Valdivastok and from there to Yokohama and from there to Vancouver.

Q. Could you not buy a ticket in your home village direct to your destination?      A. No.

Q. Did you leave home with the other eight Russians who are now on this boat?

A. The whole bunch went together.

Q. Are any of them related to you?      A. No.

Q. Why did you start for Vancouver rather than the United States?

A. Because I have a brother in Vancouver.

Q. He advised you to come?

A. Yes, he advised me.

Q. Did you ever have any letters from any friends in the United States?

A. Yes, from Portland letters saying please come you will be better off here than in the old country.

Q. Why did you not land at Victoria?

A. I don't know why.

Q. They told you you could not land?

A. Yes, they told me so.

Q. Did they say you must go back to Russia or Japan?

A. They told me to go to Seattle. He only questioned one of us.

Q. Which one? A. Jakob Ephimoff.

Q. Have you any property in Russia?

A. I have a house and some land.

Q. How much land?

A. I have land enough for one soul, nine acres.

Q. Were you able to make a living off your nine acres?

A. No, it is not enough land. It is very hard to make a living.

Q. How many persons are dependent on you for support? A. Wife and two sons.

Q. How will they make a living while you are away?

A. I left them enough bread for a year and \$100 in cash. [22]

Q. What would you do if you were landed?

A. I think I have enough money until I go to work. If not all I have to do is to send a telegram to my brother in Vancouver and he will send me money.

Q. What kind of work will you do?

A. I can work also in the woods and in gold mines.

Q. Do you believe in polygamy? A. No.

Q. Have you ever been an inmate of any penal or charitable institution? A. No.

Q. Are you not crippled or deformed in any way?

A. No.

Q. Do you believe in government by law?

A. Yes.

Q. Do you belong to any societies?

A. All I belong to is the village community.

Q. Do you believe in the teachings of anarchy?

A. I do not know what it means.

Q. Do you not know that in Russia there are certain persons banded together to overthrow the government and make attempts from time to time to overthrow the officers?

A. During the Japanese war there was all kinds of murders.

Q. Didn't you ever hear of the anarchists who throw bombs and try to kill Russian officials?

A. I live in a small village, and I never hear of it. We thought there was something like that in the cities.

The applicant is of good physique, of average intelligence, but apparently not very well informed.

**[Testimony of Ivan Riaboff.]**

IVAN RIABOFF, sworn, testified as follows: Name is Ivan Riaboff; Russia, Russian; male, aged 38 years; married; reads and writes, farm laborer; last permanent residence, Krasnoie, Simbirsk, Russia; nearest relative in Russia, wife Anna, Krasnoie, Simbirsk, Russia; destined to Vancouver, Canada, but they would not let me land so I want to go to Portland, Oregon; has brother in law, Stephen Philatoff, care of Stancheff Brothers, 73 North Third Street, Portland, Oregon; produces order for pas-

sage from Victoria to Vancouver; \$50.00; paid own passage; never in the United States.

Q. Have you a passport?

A. Yes, presents a passport dated November 24, 1913, issued at Valdivastok, Russia, permitting the bearer to leave Russia.

Q. When did you leave your home village?

A. About 50 days ago.

Q. These other men left at the same time?

A. All together.

Q. All going to Vancouver?      A. Yes.

Q. You bought a ticket to Valdivastok then to Yokohama and then to Vancouver?      A. Yes, sir.

Q. Have you any relative in Vancouver or Canada?

A. Yes, sir. An uncle—mother's brother—in Vancouver.

Q. Any relative in the United States.

A. I have my wife's brother.

Q. Have you any property in Russia?

A. I have three acres of land and a house and some cattle.

Q. How many people dependent on you for support?

A. I have my wife, a 17 year old son and a 15 year old daughter.

Q. How will they make a living now that you have left them?

A. I left them plenty of corn that they could sell and realize a few hundred dollars besides corn for their own consumption. [23]

Q. What would you do if you were landed from



this boat?      A. Any kind of labor I can get.

Q. Where would you go?      A. Go to Portland.

Q. Do you believe in polygamy?      A. I do not.

Q. Were you ever an inmate of any charitable or penal institution?      A. No.

Q. Do you believe in organized government?

A. Yes, sir.

Q. Are you affiliated with any anarchistic associations?      A. I do not understand what it is.

Q. Do you know that in Russia there are certain associations which are banded together for the purpose of killing government officials?

A. I have heard of that.

Q. You do not belong to any of them or do not believe in that practice?      A. No.

Q. Are you in good health?      A. Good health.

Q. Not crippled or deformed in any way?

A. No.

The applicant is of average intelligence but not very well informed. He is of good physique.

**[Testimony of Jakob Ephimoff.]**

JAKOB EPHIMOFF sworn, testified as follows:  
Name is Ivan Riaboff; Russia; Russian; male, aged 34 years; married; reads and writes; farm laborer; last permanent residence, Krasnoie, Simbirsk, Russia; nearest relative in Russia, wife Agaphia, Krasnoie, Simbirsk, Russia; destined to Vancouver, Canada, but they would not let me land so I want to go to Portland, Oregon; has cousin Alexei Kalimoff, care of Stancheff Brothers, 73 North Third Street, Portland, Oregon; has order for passage from Victoria to Vancouver; \$52.20; paid own passage; never



in the United States.

Q. Have you a passport?

A. Yes. (Presents passport dated November 24, 1913, issued at Valdivastok, Russia, permitting the bearer to leave Russia.)

Q. Have you ever applied for admission to the United States before?      A. No.

Q. You left your home village in Russia with these other eight Russians who are now detained?

A. I left with the rest of them.

Q. And you bought a ticket to Valdivastok, thence to Yokohama, thence to Vancouver, B. C.?

A. Yes, sir.

Q. Why were you going to Vancouver, B. C.?

A. I have a cousin there.

Q. Why did you attempt to go to Canada rather than the United States?

A. Well, my relatives wrote to me from Portland and Vancouver and we thought that that was the nearest and would be less expense.

Q. Why did you not land at Victoria?

A. They would not let me land.

Q. Why?      A. I don't know why.

Q. What did they tell you?

A. Well, some officer told me that they didn't want any laborers there. There is no work here; go to Seattle.

Q. Did he tell you that you would have to go back to Russia?      A. No.

Q. Well, did he tell you you could go to Canada from Seattle?      A. No, he did not say so.

Q. Did you have an interpreter in Russian to talk?

A. There was a passenger who spoke Russian.

Q. What kind of work did you follow in Russia?

A. I worked on my land and also worked in the woods. [24]

Q. How much land have you?

A. Seven and a half acres.

Q. How much of a family have you dependent upon you for support?

A. I have a son 17 years old and a daughter 17 years old and a wife.

Q. Where did you get the money to come to this country?

A. Sold cattle and worked in the woods and sold some corn.

Q. You do not know how to do the kind of work you would be required to do in this country, do you?

A. I am not afraid of the work.

Q. What reason have you to believe that you could get work?

A. They wrote to us there is plenty of work here.

Q. When was that?

A. About two months ago.

Q. Who wrote you?

A. My cousin in Portland and my cousin in Vancouver.

Q. Did they say they had a job for you?

A. No, he said there was plenty of work you can get.

Q. Have you ever been an inmate of a penal or charitable institution? A. No.

Q. Do you believe in the teachings of the anarchists? A. No.

A. Just my neighbors, no relatives.

Q. Did you receive any letters from any of them?

A. From Portland?

Q. Yes.

A. Yes, I received a letter from Portland.

Q. What did those letters contain in the way of suggestions or information?

A. My cousin wrote to my father and told him that if I wanted to come I could get lots of work, and if he needs it I can give him a little money until he gets to work.

Q. You are not familiar with the means of work which are open to laborers in this country, are you?

A. I think according to the letters that the work is the same.

Q. Were you ever confined in a charitable or penal institution?     A. No.

Q. Do you belong to any anarchistic societies?

A. No.

Q. You know what they are?

A. This is the first time I hear the word anarchist.

Q. You know what annihilationist means?

A. No.

Q. Do you know that in Russia there are certain people banded together who believe in the killing of government officials?     A. Never heard of it.

Q. Your cousin in Portland is a common laborer?

A. Yes, sir.

Q. Have you any property in Russia?

A. I have a cow, a horse, a house and nine acres of land.

Q. How many people dependent upon you for sup-

port?      A. Wife and five children.

Q. Where did you get the money to come to Canada—to buy your ticket?

A. I had my own money.

Q. Where did you get it?

A. I sold some cattle and grain.

The applicant is not very bright, not very well informed, apparently honest in his statements, and of good physique.

**[Testimony of Ivan Emelin.]**

IVAN EMELIN, sworn, testified as follows: Name is Ivan Emelin; Russia; Russian; male, aged 39 years; married; reads and writes; common laborer; last permanent residence, Krasnoie, Simbirsk, Russia; nearest relatives in [26] Russia, wife Alexei, Krasnoie, Simbirsk, Russia; destined to Vancouver, Canada, but they would not let me land so I want to go to Portland, Oregon; has third cousin, Engraph Lipatoff, care of Stancheff Brothers, 73 North Third Street, Portland, Oregon; has order for passage from Victoria to Vancouver; \$46.00; borrowed money to pay passage; never in United States before.

Q. Have you a passport?

A. Yes. (Presents passport dated November 24, 1913, issued at Valdivastok, Russia.

Q. Have you ever applied for admission to the United States before?      A. No.

Q. You were traveling with this party of nine and were refused landing at Victoria?      A. Yes.

Q. Have you any property in Russia?

A. I have a house, a cow and nine acres of land.



Q. Family?      A. I have a wife.

Q. No children?      A. No.

Q. Do you believe in polygamy?      A. No.

Q. Have you ever been an inmate of any charitable or penal institution?      A. No.

Q. Do you believe in anarchy?

A. No, I don't know what it is.

Q. Do you not know that in Russia there are people banded together who believe in killing government officials because of their official character?

A. I have heard that somewhere those things occur.

Q. You do not believe in it?      A. No.

Q. What would you do if landed from this boat?

A. I will go and look for work.

Q. Suppose you can't find work?

A. I ought to be able to get a job.

Q. Suppose there is no job?

A. We will wait two or three days. Anyhow we will be able to feed ourselves until spring.

Q. Do you know what living costs in this country?

A. Well, it would cost about \$3.50 a week. We can also write to our friends. They will either write and send us money or come themselves.

Q. Are you familiar with the lines of work which a laborer has to do in this country?

A. I heard they are about the same.

Q. What kind of work did you do in Russia?

A. Worked on my land and as a laborer.

The applicant is of good physique, rather dull and ignorant, but apparently honest.

Cases Deferred.



**[Certificate of Stenographer to Testimony.]**

I hereby certify that the foregoing is a correct transcript of the testimony given in these cases.

TRENT DOSER,  
Stenographer. [27]

UNITED STATES DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Seattle, Washington, December 22, 1913.

In re Cases of GREGORI KORNILIN, MOISEI  
ALIOSHIN, IVAN RIABOFF, JAKOB  
EPHIMOFF, PETER NEONILIN, and  
IVAN EMELIN.

Ex SS. "TAMBA MARU," December 19, 1913.

HEARING RESUMED.

At a Meeting of the Board of Special Inquiry, Convened Pursuant to the Instructions of the Commissioner, composed of Inspectors T. W. Lynch (Chairman), J. E. Wilkes, and A. T. White.

Stenographer—Trent Doser.

Interpreter—Henry G. Gerome.

**Findings [of Inspectors].**

These aliens were ticketed to Canada and were refused a landing in that country by the Dominion Immigration Agent at Victoria, B. C. They did not take an appeal from his decision but after having been brought to this port on the same vessel by which they had arrived in Canada, applied for admission. The steamship company manifested them as from Japan to Seattle, and collected a deposit to cover

head tax but did not collect any additional passage money.

These aliens in my judgment are persons likely to become public charges and therefore inadmissible to the United States. They are common laborers or farm laborers and there is no work for them. They have but a limited amount of money, an amount insufficient to maintain them during the winter and it has not been shown that they have any relatives in this country upon whom they have a lawful claim for support or who are in a position to care for them even if disposed to do so. There are at this time from 800 to 1,000 Russians unemployed in this city and *there thousands* of other nationalities in the same condition. Reports from the interior are uniformly to the effect that the supply of common labor is far in excess of the demand. The City of Seattle is endeavoring to relieve the situation by giving married men a few days employment each week on public work, and according to the public press the same methods are in vogue at Portland, Oregon, the point to which these aliens are destined. Their admission under the circumstances would only increase the number of unemployed and would tend to make greater the burden which will have to be borne by the state and by charitable organizations [28] during the coming winter months. The care of those now destitute is a problem sufficiently great to tax the ingenuity and resources of the State and more fortunate public, and any additions to the army of unemployed should be guarded against by every possible means until such time as there is work for them to

do. Alien laborers should not be permitted to enter the United States.

Nine men constituted the party ticketed to Canada originally, although three of them contend that they were so routed through a misunderstanding. Canada refused them admission and that Government is therefore primarily responsible for any inconvenience or hardships which they may suffer if deported. I, therefore, move that these aliens be excluded as persons likely to become public charges and ordered deported to the country whence they came at the expense of the importing vessel.

Inspector WILKES.—I second the motion.

Inspector WHITE.—The aliens are unanimously excluded.

Kornilin, Alioshin, Riaboff, Ephimoff, Neonilin, and Emelin, you have been excluded by a Board of Special Inquiry, which finds that you are inadmissible to the United States for the reason that you are a person likely to become a public charge. From this decision you have the right to appeal to the Secretary of Labor at Washington, D. C. If you elect to appeal notice should be given promptly.

You have been ordered deported to the country whence you came and you are hereby advised that such deportation will be at the expense of the importing vessel.

You are further advised that you may communicate with friends, relatives, your Consul or representative, or attorney.

Seattle, Washington, December 23, 1913.

**Statement by Gregori Kornilin Made Through  
Interpreter Henry Gerome.**

It would work a hardship on me to be turned back, because I have sold a horse, a cow and have mortgaged my land. I came on the assurance of Paul Semenoff, a countryman and neighbor of mine, who said that there was plenty of good work in this country, and not only that but I know that he is sending for his wife to come here, which proves to me that he must be doing well because he has only been in this country a short while. I would respectfully beg to be left in this country. I hereby appeal to the Secretary of Labor at Washington, D. C., from the excluding decision of the Board. I do not want an attorney and I do not desire to submit any further argument or evidence. [29]

**Statement by Moisei Alioshin Made Through  
Interpreter Henry Gerome.**

I do not wish to be sent back for it will work a hardship upon me, as I have sold a horse, a cow and all my crop, consisting of a few acres, and was coming out to this country on the assurances of two of my relatives, one in Vancouver, B. C., and one at Portland, Oregon, that it is an easy matter to make a living in this country, and relatively speaking the wages in this country are better than at home, and I would be able to earn money to send for my family to come here. I hereby apply to the Secretary of Labor at Washington, D. C., from the excluding decision of the Board, and do not desire to



be represented by an attorney. I do not desire to submit any further argument or to submit any further evidence.

**Statement by Ivan Riaboff Made Through Interpreter Henry Gerome.**

I wish to be left in this country and not deported back for I have not sufficient money to travel about 6,000 miles to get to my home from Japan, and I have sold a horse, oats and rye in order to come to this country and left enough for my wife to live on. I came out on the assurance of my brother in law, Stephen Philatoff, who makes his home in Portland, and he assured me that there is plenty of work and good wages for an able-bodied man, and assured me that if it happens that in the winter time there is little work he will aid me until spring and he also said that he is going to send for his family, and after a matter of six months I would be able to send for mine. I hereby appeal on the record as it stands to the Secretary of Labor at Washington, D. C. I do not desire an attorney and do not desire to submit any further evidence or argument.

**Statement by Jakob Ephimoff Made Through Interpreter Henry Gerome.**

I wish to be left in this country in order to be able to make a living for myself and bring out my wife, as I have not only sold a cow and horse but have rented my land for 12 years for \$100. My relative in Canada and here told me that I could make a living here and bring out my family, and for some reason the Canadian Immigration Department did not



let me in so I would respectfully beg to be left here, as I have another relative in Portland, Oregon. I hereby appeal to the Secretary of Labor, Washington, D. C., from the excluding decision of the Board. I do not desire to be represented by an attorney and I do not desire to submit any further evidence or argument.

**Statement by Peter Neonilin Made Through Interpreter Henry Gerome.**

It would work a hardship upon me to return home as I have a wife and five children there and I have received assurance from my relative in Portland, Oregon, that I would be able to make a living for them and also in Canada. Otherwise I would not have sold my horse and my cow [30] and some oats and rye, because I would have kept them for seed and the horse to work the land and the cow for milk for the children. I have not enough money to return home and if I had I would not be able to make a living there as there is no work in the winter. I desire to appeal to the Secretary of Labor at Washington, D. C., from the excluding decision of the Board, and I do not desire to be represented by an attorney. I do not desire to submit any further evidence or to make any further argument.

**Statement by Ivan Emelin Made Through Interpreter Henry Gerome.**

I would like to be left in this country for I have sold a horse and a cow at home and some of the crop and it will work a hardship upon me to return home for I have not sufficient money to get to the place I

would have to travel to to get home and it is winter and there is no work there. I have relatives and friends both in Canada and Portland, Oregon and according to their letters and information they are all making a living and I am sure they would help me out if I could not get anything to do during the winter. From Yokohama to Valdivastok the fare is, in American money, \$5.15 and from Valdivastok to my home costs about \$35.00 in American money. I wish to appeal from the excluding decision of the Board. I do not desire to submit any further evidence. We all came on the assurances of our friends and relatives in Canada and Portland, Oregon, and as they are all making a living we took their word and thought we could make a good living here. I have no further argument to make.

**[Certificate of Stenographer to Transcript of  
Testimony.]**

I hereby certify that the foregoing is a correct transcript of the testimony given in these cases.

TRENT DOSER,

Stenographer [31]

[Letter, Dated December 20, 1913, Acting Commissioner, Seattle, Wash., to Inspector at Vancouver, B. C.]

DEPARTMENT OF COMMERCE AND LABOR  
IMMIGRATION SERVICE.

Office of the Commissioner,  
Seattle, Wash., December 20, 1913.

No. 4311.

Inspector in Charge,  
U. S. Immigration Service,  
Vancouver, B. C.

There were nine Russians arrived on the SS.  
"Tamba Maru" on the 19th instant, to wit:

Kornilin Gregori,  
Moisei Alioshin,  
Ivan Riaboff,  
Jakob Ephimoff,  
Peter Neonilin,  
Ivan Emelin,  
Jakof Orloff,  
Grigori Yakimoff,  
Philip Yakimoff,

I understand from some of the officers of the vessel that these Russians applied for admission to Canada at Victoria but for some reason or other were not permitted to land. Kindly advise me if these aliens were rejected at that port and if so for what cause and exactly what action was taken. Were they ordered deported and if so to what country. These Russians applied here for admission to the United States. If they were ordered deported from

Victoria, would there be any objection on the part of the Canadian officers to their being landed in the United States or do they prefer that the order of deportation be carried out?

(Signed) JOHN H. SARGENT,  
Acting Commissioner.

Exact copy as signed by John H. Sargent.

Mailed Dec. 20, 1913, by F. J. A.

JHS/D.

Indorsed: Return to Petition and Writ of Habeas Corpus. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 17, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [32]

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*In the District Court of the United States, for the  
Western District of Washington, Northern Division.*

No. 2646.

In the Matter of the Petition of K. GREGORY et al.  
for a Writ of Habeas Corpus.

**Order Granting Writ and Discharging Petitioners.**

This matter having come on for hearing on the 17th day of January, 1914, on the petition for a writ of habeas corpus in the above-entitled matter, the petitioners appearing by Parker and Kalina, their attorneys, and the respondent appearing by Clay Allen, United States Attorney, and Geo. P. Fishburne, Assistant United States Attorney, and it appearing to the Court that the writ of habeas corpus

should be granted and the petitioners should be discharged;

It is hereby ordered that the said writ be, and the same is hereby granted, and all of said petitioners discharged, unless within *then* days an appeal is presented; and that pending the appeal from this final discharge; each of the above petitioners shall be enlarged upon recognizance, with surety, in the sum of Two hundred and fifty (\$250.00) dollars, for their appearance to answer the Judgment of the Appellate Court.

Dated this 27th day of January, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order Granting Writ and Discharging Petitioners. Filed in the United States District Court, Western Dist. of Washington, Northern Division, Feb. 2, 1914. Frank L. Crosby Clerk. By Ed. M. Lakin, Deputy. [33]



[Opinion.]

*United States District Court, Western District of  
Washington, Northern Division.*

No. 2646.

In the Matter of the Petition of K. GREGORY et al.  
for a Writ of Habeas Corpus.

Filed Jan. ———, 1914.

ON MOTION FOR DISCHARGE. MOTION  
GRANTED.

PARKER & KALINA, for Petitioners.

CLAY ALLEN, U. S. Attorney, G. F. FISH-  
BURN, Asst. U. S. Atty., for Respondent.

NETERER, District Judge.

K. Gregory and seven others files a petition praying a writ of habeas corpus alleging that they are in good faith seeking admission into the United States to make the United States their permanent home; that they do not come within any of the classes prohibited admission. A show cause order was issued and the Commissioner of Immigration made return setting forth, in substance, that the petitioners sought admission and were held for special inquiry by the immigrant inspector and a board of special inquiry was organized as provided by law, and:

“That on December 23, 1913, after a full hearing (a duplicate report of which appears in the immigration files of this cause and is marked Exhibit “A” and made a part of this Return), the Board decided to reject the aliens on the ground

that they were persons who were likely to become a public charge, for the following reasons:

First: Because they are common or farm laborers and there is no work for them in the United States.

Second: Because they have but a limited amount of money, insufficient to maintain them during the winter.

Third: Because there are 800 to 1000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the Interior are to the effect that the supply of common labor is far in excess of demand.

Fourth: That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time."

That the petitioners appealed to the Secretary of Labor who affirmed the decision of the Board of Special Inquiry.

The petitioners move that they be forthwith discharged for the reasons:

"(1) That the return shows that they are detained and restrained of their liberty for unlawful reasons and contrary to the statutes in such cases made and provided; (2) that the Special Examining Board and the Secretary of Commerce and Labor and said Commissioner exceeded their authority and jurisdiction; (3) that the alleged reasons for detaining said petitioners are [34] irrelevant, immaterial and not supported by evidence, and are frivolous and sham; (4) that said

petitioners had all the personal qualifications required of them by the statutes and to entitle them to immediate and unconditional discharge.”

This Court held *In re Moola Singh*, 207 Fed. 780, that the jurisdiction of this Court is limited to ascertaining whether the petitioners were denied a hearing, and if a hearing has been accorded, the Court is precluded from a re-examination of the issue presented merely because it is contended that the conclusion of the Immigration officers based upon the testimony was wrong. In the *Moola Singh* case a trial was had, and the conclusion of the examining board was that the aliens be excluded from admission under the laws of the United States. The conclusion of the board found delinquency in the personal qualifications of the applicants which brought them within the exclusion provisions of the act. This Court cannot examine into the testimony produced upon the hearing in this case before the special examining board, nor enter upon a re-examination of the facts. This Court is bound by the facts as found by the board of special inquiry. Do the facts as found bring the petitioners within the provisions of the exclusion provisions of the Act? Are the petitioners qualified to enter under the findings of the board, and is the Act of the board beyond its jurisdiction, and does the personal condition of the applicants, as found, preclude their exclusion?

Sec. 1 of the Immigration Act of February 20, 1907, reads:

“That there shall be levied, collected and paid a tax of four dollars for every alien entering the United States.”

Sec. 2 of the Act provides who are to be excluded, among whom are “persons likely to become a public charge.” Sec. 10 of the Act provides:

“That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section Two of this Act.”

Sec. 24 of the Act provides: [35]

“ . . . Immigration officers shall have power to administer oaths, and to take and consider evidence touching the right of any alien to enter the United States, and where such action is necessary to make a written record of such evidence.”

A provision for the punishment of any persons who shall knowingly or willfully give false oaths or swear to any false statement is made, and it is also provided that the decision of such officer in admitting an alien shall be subject to challenge by any other officer, and such challenge shall operate to take the alien whose right to land is challenged before a board of special inquiry for its investigation. It is further provided:

“Every alien who may not appear to the examining immigrant inspector at the port of arrival to



be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

"Sec. 25. . . . All hearings before boards shall be separate and apart from the public . . . and the decision of any two of the board shall prevail; but either the alien or any dissenting member of said board may appeal . . . to the Secretary of Labor . . . that in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor."

Under Sec. 2, an alien "likely to become a public charge" is excluded; and under Sec. 25, the decision of the board of special inquiry is final where the alien is by law excluded. The findings and conclusions of the board with relation to the petitioners, however, eliminate all physical and mental deficiencies legislated against. Shall it be said, under such a record, that the examining board can exclude an alien upon the conclusion that he is "likely to become a public charge," when, upon the facts found and reasons given, the applicant is not brought within the provisions of the act excluding him from admission?

In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provisions



of the Act. The reasons given do not exclude them under the Act. These reasons are proper subjects for the consideration of Congress but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our Government [36] rests forbid the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority.

Ex parte Saraceno, 182 Fed. 955;

Lewis vs. Frick, 189 Fed. 146;

In re Feinkoff, 47 Fed. 447;

Ex parte Koerna, 176 Fed. 479;

In re O'Sullivan, 31 Fed. 447;

United States vs. Martin, 192 U. S. 1.

The petitioners are discharged; but, if within ten days after the filing of this decision, the respondent appeals, the petitioners must give recognizance with sufficient surety in the sum of \$250.00 each, conditioned to appear and answer the judgment of the Appellate Court in accordance with Supreme Court Rule 34.

#### JEREMIAH NETERER.

[Indorsed]: Petition for Writ of Habeas Corpus. Writ Sustained. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 27, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [37]

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 2646.

In the Matter of Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, G. YAKIMOFF  
and P. YAKIMOFF for a Writ of Habeas  
Corpus.

**Petition for and Order Allowing Appeal.**

PETITION FOR APPEAL TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT AND ORDER  
ALLOWING SAME.

Henry M. White, Commissioner of Immigration,  
at Seattle, Washington for the United States Gov-  
ernment the respondent in the above-entitled cause,  
by Clay Allen, United States Attorney for the West-  
ern District of Washington, and George P. Fish-  
burne, Assistant United States Attorney for said  
District, feeling himself aggrieved by the order and  
judgment of discharge, dated January 27, 1914, and  
entered February 2, 1914, and the decision, filed Jan-  
uary 27, 1914, does hereby appeal from said order  
and judgment of discharge and said decision to the  
United States Circuit Court of Appeals for the Ninth  
Circuit and prays that his appeal may be allowed,  
and that a transcript of the record and all proceed-  
ings and papers upon which said order and judgment

of discharge and decision were made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner respectfully prays that on account [38] thereof this appeal be allowed to correct the errors complained of, and to reverse, annul and set aside the said order and judgment, dated January 27, 1914, and entered in the premises on February 2, 1914, and the decision, filed January 27, 1914.

Your petitioner further says that he has this day filed herein his assignment of errors committed in the above-entitled proceeding, and intended to be urged by your petitioner as appellant upon the prosecution of this suit upon appeal.

Your petitioner further says that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, on behalf of the United States of America, and respectfully prays that said appeal may be allowed without bond.

Dated at Seattle, Washington, this 4th day of February 1914.

CLAY ALLEN,

United States Attorney.

G. P. FISHBURNE,

Assistant United States Attorney.

**[Order Allowing Appeal, etc.]**

And now on this fourth day of February, 1914, it is ordered that the appeal prayed for in the foregoing petition be allowed as prayed for by said Henry M. White, Commissioner of Immigration at Seattle, Washington, for the United States Government.

And it is further ordered, that the said applicants, [39] K. Gregory, M. Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff, each may be enlarged pending the said appeal, upon executing a recognizance, with surety, in the sum of Two Hundred and Fifty Dollars (\$250.00), to the satisfaction of the Clerk of the above-entitled court, for his appearance to answer the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and upon his failure to give bail, to remain in the custody of the Commissioner of Immigration at Seattle, Washington.

JEREMIAH NETERER,  
United States District Judge, Presiding in said  
Western District of Washington.

[Indorsed]: Petition for and Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 4, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [40]

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*In the District Court of the United States, for the  
Western District of Washington Northern Division.*

No. 2646.

In the Matter of Application of K. GREGORY, M. ALOSHIN, I. RIABOFF, P. NEANLIN, I. EMELIN, L. ORLOFF, G. YAKIMOFF and P. YAKIMOFF for a Writ of Habeas Corpus.

**Assignment of Errors.**

Comes now Henry M. White, Commissioner of Im-



migration at Seattle, Washington, for the United States Government, the respondent and appellant in the above-entitled cause, by Clay Allen, United States Attorney for the Western District of Washington, and George P. Fishburne, Assistant United States Attorney for said District, and says that in the record and proceedings in this cause and in the order and judgment of discharge, dated the 27th day of January, 1914, and filed and entered in the Clerk's office February 2, 1914, and in the decision of the Court, made and filed the 27th day of January, 1914, there is manifest error in this, to wit:

I.

That the Court erred in issuing the writ of habeas corpus.

II.

That the Court erred in assuming jurisdiction of the case. [41]

III.

That the Court erred in holding that he had jurisdiction and power to discharge the petitioners, K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emlin, L. Orloff, G. Yakimoff and P. Yakimoff, when the records showed they had previously had a hearing before the Immigration Board, which had rendered a decision excluding their admission and which decision was affirmed by the Secretary of Labor.

IV.

That the Court erred in finding that said petitioners were not "likely to become a public charge."

V.

That the Court erred in finding that he or any



court has a right to say what are the matters to be taken into consideration by the Immigration Board in determining what aliens are "likely to become a public charge."

#### VI.

That the Court erred in finding that the Immigration Board exceeded its authority in excluding the said petitioners on the ground that they are "likely to become a public charge," because it based its decision upon reasons not within the Act.

#### VII.

That the Court erred in setting aside the decision of the Immigration Board, affirmed by the Secretary of Labor, that the said petitioners were "likely to become a public charge."

#### VIII.

That the Court erred in holding that the Immigration Board exceeded its authority in its decision, affirmed by [42] the Secretary of Labor, that the said petitioners should be excluded because they were "likely to become a public charge."

#### IX.

That the Court erred in finding that the courts had power to intervene where the Immigration Board exceeded its authority, if the decision was already affirmed by the Secretary of Labor.

#### X.

That the Court erred in not finding that said petitioners had a hearing according to the Act, and that therefore the Immigration Board and the Secretary of Labor did not exceed their authority in holding that said petitioners should be excluded because they

were "likely to become a public charge."

XI.

That the Court erred in not holding that seeing and questioning the said petitioners by the Immigration Board was such taking of testimony as would exclude the courts from reviewing the decision of the Immigration Board, affirmed by the Secretary of Labor, holding that the said petitioners should be excluded on the ground they were "likely to become a public charge."

XII.

That the Court erred in finding that the Immigration Board excluded the said aliens as "likely to become a public charge" upon facts and reasons not within the Immigration Act.

XIII.

That the Court erred in finding that the Immigration Board excluded the said aliens on grounds not set forth in the Act. [43]

XV.

That the Court erred in rendering the decree discharging the said petitioners from the custody of the officers of the United States and restoring them to their liberty.

XVI.

That the Court erred in not holding that the decision of the Immigration Board, affirmed by the Secretary of Labor, that the said aliens were "likely to become a public charge," was a decision on a question of fact that could not be reviewed or reversed by the Court.

WHEREFORE, Henry M. White, Commissioner

of Immigration at Seattle, Washington, respondent and appellant herein, prays that his assignment of errors be entered upon the record in this cause, and that upon the hearing of this appeal it may be adjudged by the United States Circuit Court of Appeals for the Ninth Circuit that the order and judgment, dated January 27, 1914, and entered February 2, 1914, and the decision, made and filed January 27, 1914, be in all things reversed, set aside and held for naught, and that it be adjudged and decreed that the applicants, K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff, be remanded to the custody of the respondent herein to be further dealt with according to law.

Dated at Seattle, Wash., February 4, 1914.

CLAY ALLEN,

United States Attorney.

G. P. FISHBURNE,

Assistant United States Attorney. [44]

[Indorsed]: Assignment of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 4, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [45]

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*In the District Court of the United States, for the Western District of Washington Northern Division.*

No. 2646.

In the Matter of Application of K. GREGORY, M. ALOSHIN, I. RIABOFF, P. NEANLIN, I. EMELIN, L. ORLOFF, G. YAKIMOFF and P. YAKIMOFF for a Writ of Habeas Corpus.

**Citation [on Appeal (Copy)].**

To K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff, and to John R. Parker and Jacob Kalina, Their Attorneys:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the United States District Court for the Western District of Washington, in a proceeding therein entitled "In the Matter of Application of K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff for a Writ of Habeas Corpus," numbered 2646, and show cause, if any there be, why the order and judgment and the decision of the United States District Court for the Western District of Washington, in said appeal mentioned, should not be reversed, set aside and held for naught, and why speedy justice should not be done in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief [46] Justice of the United States, this Fourth day of February, 1914.

[Seal] JEREMIAH NETERER,  
United States District Judge Presiding in said Western District of Washington.

Receipt of a copy and due and legal service of the



above Citation is hereby admitted this 4th day of February, 1914.

JOHN R. PARKER,  
JACOB KALINA,  
Attorneys for Petitioners.

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein-named John R. Parker and Jacob Kalina by handing to and leaving a true and correct copy thereof with John R. Parker, a member of the firm of John R. Parker and Jacob Kalina, personally at Seattle, in said District on the 4th day of February, A. D. 1914.

JOHN M. BOYLE,  
U. S. Marshal.  
By Geo. B. Devenpeck,  
Deputy.

Marshal's fees: \$2.00. [47]

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RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named John R. Parker by handing to and leaving a true and correct copy thereof with John R. Parker, personally at Seattle,



in said District, on the 4th day of February, A. D. 1914.

JOHN M. BOYLE,

U. S. Marshal.

By Geo. B. Devenpeck,

Deputy.

Marshal's fees: \$2.12.

[Indorsed]: Citation. Filed in the U. S. District Court, Western District of Washington, Northern Division, Feb. 4, 1914. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy. [48]

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*United States District Court for the Western District of Washington.*

No. 2646.

In the Matter of Application of K. GREGORY, M. ALOSHIN, I. RIABOFF, P. NEANLIN, I. EMELIN, L. ORLOFF, G. YAKIMOFF and P. YAKIMOFF for a Writ of Habeas Corpus.

**Praecipe [for Transcript of Record].**

To the Clerk of the Above-entitled Court:

You will please send up the following portions of the record in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

Petition for Writ of Habeas Corpus.

Appearance by the Attorneys.

Order to Show Cause why the Petitioners should not be discharged.

Writ of Habeas Corpus.

Return to the Petition and Writ of Habeas Corpus  
and Exhibit "A" thereto attached.

Order dated January 27, 1914, and filed February 2,  
1914.

Decision filed January 27, 1914.

Petition and Order Allowing Appeal.

Citation and proofs of its service.

Assignment of Errors.

In brief, all papers filed Feb. 4, 1914.

CLAY ALLEN,

District Attorney.

G. P. FISHBURNE,

Assistant U. S. Dist. Attorney.

[Indorsed]: Praeceptum. Filed in the U. S. District  
Court, Western Dist. of Washington, Northern Divi-  
sion, Feb. 4, 1914. Frank L. Crosby, Clerk. By E.  
M. L., Deputy. [49]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 2646.

In the Matter of the Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, G. YAKIMOFF  
and P. YAKIOFF for a Writ of Habeas  
Corpus.

United States of America,

Western District of Washington.—ss.

I, Frank L. Crosby Clerk of the United States

District Court, for the Western District of Washington, do hereby certify the foregoing 49 typewritten pages, numbered from 1 to 49, inclusive, to be a full true, correct and complete copy of so much of the record papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript of the record on appeal is the sum of Thirty-eight and 20/100 (\$38.20) dollars, chargeable to the United [50] States, and that the said sum will be included in my account against the United States for Clerk's fees for the quarter ending March 31, 1914.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of February, A. D. 1914.

[Seal]

FRANK L. CROSBY,

Clerk. [51]

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 2646.

In the Matter of Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, G. YAKIMOFF  
and P. YAKIMOFF for a Writ of Habeas  
Corpus.

**Citation [on Appeal (Original)].**

To K. Gregory, M. Aloshin, I. Riaboff, P. Neanlin,  
I. Emelin, L. Orloff, G. Yakimoff and P. Yakim-  
off, and to John R. Parker and Jacob Kalina,  
Their Attorneys:

You, and each of you, are hereby cited and admon-  
ished to be and appear before the United States  
Circuit Court of Appeals for the Ninth Circuit, at  
the City of San Francisco, in the State of California,  
within thirty days from the date of this Citation,  
pursuant to an appeal filed in the clerk's office of the  
United States District Court for the Western Dis-  
trict of Washington, in a proceeding therein en-  
titled "In the Matter of Application of K. Gregory,  
M. Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L. Or-  
loff, G. Yakimoff and P. Yakimoff for a Writ of  
Habeas Corpus," numbered 2646, and show cause, if  
any there be, why the order and judgment and the  
decision of the United States District Court for the  
Western District of Washington, in said appeal  
mentioned, should not be reversed, set aside and held



for naught, and why speedy justice should not be done in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief [52] Justice of the United States, this fourth day of February, 1914.

[Seal] JEREMIAH NETERER,  
United States District Judge Presiding in said Western District of Washington.

Receipt of a copy and due and legal service of the above citation is hereby admitted this 4th day of February, 1914.

JOHN R. PARKER,  
JACOB KALINA,

Attorneys for Petitioners. [53]

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named John R. Parker and Jacob Kalina, by handing to and leaving a true and correct copy thereof with John R. Parker, a member of the firm of John R. Parker and Jacob Kalina, personally, at Seattle, in said District, on the 4th day of February, A. D. 1914.

JOHN M. BOYLE,  
U. S. Marshal.  
By Geo. B. Devenpeck,  
Deputy.

Marshal's fees: \$2.00.



Filed in the U. S. District Court, Western Dist. of  
Washington, Northern Division. Feb. 4, 1914.

FRANK L. CROSBY,  
Clerk.

By Ed M. Lakin.

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the an-  
nexed Citation on the therein named John R. Parker,  
by handing to and leaving a true and correct copy  
thereof with John R. Parker, personally, at Seattle,  
in said District, on the 4th day of February, A. D.  
1914.

JOHN M. BOYLE,  
U. S. Marshal.

By Geo. B. Devenpeck,  
Deputy.

Marshal's fees: \$2.12.

[Endorsed]: Original. No. 2646. In the District  
Court of the United States for the Western District  
of Washington, Northern Division. In the Matter of  
Application of K. Gregory et al. for a Writ of Habeas  
Corpus. Citation. Filed in the U. S. District Court,  
Western Dist. of Washington, Northern Division.  
Feb. 4, 1914. Frank L. Crosby, Clerk. By E. M.  
Lakin, Deputy. [54]

[Endorsed]: No. 2378. United States Circuit Court of Appeals for the Ninth Circuit. Henry M. White, Commissioner of Immigration at Seattle, Washington, for the United States Government, Appellant, vs. K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff, Appellees. In the Matter of the Application of K. Gregory, M. Alosin, I. Riaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff, and P. Yakimoff for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received and filed February 13, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

IN THE  
**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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HENRY M. WHITE, Commissioner  
of Immigration at Seattle, Wash-  
ington, for the UNITED STATES  
GOVERNMENT (Respondent),

*Appellant,*

*vs.*

K. GREGORY, *et al.* (Petitioners),

*Appellees.*

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No. ....

In the Matter of the Application of K. GREGORY,  
M. ALOSHIN, I. RIABOFF, P. NEANLIN,  
I. EMELIN, L. ORLOFF, G. YAKIMOFF,  
and P. YAKIMOFF, Aliens, for a  
WRIT OF HABEAS CORPUS.

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**Brief of Appellant**

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**FACTS AND ISSUE.**

The issue in this action was on the return of the  
Commissioner of Immigration, and the motion of the

petitioners to be discharged, the relevant portions of which are in the following language:

That on December 23, 1913, after a full hearing, the board decided to reject the aliens on the ground that they were persons who were likely to become a public charge, for the following reasons:

First: Because they are common or farm laborers and there is no work for them in the United States.

Second: Because they have but a limited amount of money, insufficient to maintain them during the winter.

Third: Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of demand.

Fourth: That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time.

The petitioners moved that they should be forthwith discharged for the reasons:

(1) That the return shows that they are detained and restrained of their liberty for unlawful reasons and contrary to the statutes in such cases made and provided; (2) that the Special Examining Board and the Secretary of Commerce and Labor and said Commissioner exceeded their authority and jurisdiction; (3) that the alleged reasons for detaining said petitioners are irrelevant, immaterial and not supported by evidence, and are frivolous and sham; (4) that said petitioners had all the personal qualifications required of them by the statutes, and to entitle them to immediate and unconditional discharge.

### ASSIGNMENT OF ERRORS.

The errors assigned by appellant are as follows:

#### I.

That the court erred in issuing the Writ of Habeas Corpus.

#### II.

That the court erred in assuming jurisdiction of the case.

#### III.

That the court erred in holding that he had



jurisdiction and power to discharge the petitioners, K. Gregory, M. Alosin, I. Diaboff, P. Neanlin, I. Emelin, L. Orloff, G. Yakimoff and P. Yakimoff, when the records showed they had previously had a hearing before the Immigration Board, which had rendered a decision excluding their admission and which decision was affirmed by the Secretary of Labor.

#### IV.

That the court erred in finding that said petitioners were not "likely to become a public charge."

#### V.

That the court erred in finding that he or any court has a right to say what are the matters to be taken into consideration by the Immigration Board in determining what aliens are "likely to become a public charge."

#### VI.

That the court erred in finding that the Immigration Board exceeded its authority in excluding the said petitioners on the ground that they are "likely to become a public charge," because it based its decision upon reasons not within the act.

## VII.

That the court erred in setting aside the decision of the Immigration Board, affirmed by the Secretary of Labor, that the said petitioners were "likely to become a public charge."

## VIII.

That the court erred in holding that the Immigration Board exceeded its authority in its decision, affirmed by the Secretary of Labor, that the said petitioners should be excluded because they were "likely to become a public charge."

## IX.

That the court erred in finding that the courts had power to intervene where the Immigration Board exceeded its authority, if the decision was already affirmed by the Secretary of Labor.

## X.

That the court erred in not finding that said petitioners had a hearing according to the act, and that therefore the Immigration Board and the Secretary of Labor did not exceed their authority in holding that said petitioners should be excluded because they were "likely to become a public charge."

## XI.

That the court erred in not holding that seeing and questioning the said petitioners by the Immigration Board was such taking of testimony as would exclude the courts from reviewing the decision of the Immigration Board, affirmed by the Secretary of Labor, holding that the said petitioners should be excluded on the ground that they were "likely to become a public charge."

## XII.

That the court erred in finding that the Immigration Board excluded the said aliens as "likely to become a public charge" upon facts and reasons not within the Immigration Act.

## XIII.

That the court erred in finding that the Immigration Board excluded the said aliens on grounds not set forth in the act.

## XIV.

That the court erred in rendering the decree discharging the said petitioners from the custody of the officers of the United States and restoring them to their liberty.

## XV.

That the court erred in not holding that the decision of the Immigration Board, affirmed by the Secretary of Labor, that the said aliens were "likely to become a public charge," was a decision on a question of fact that could not be reviewed or reversed by the court.

## THE COURT'S DECISION.

The material part of the decision of the court, which very ably presents the most tenable position to be taken by the appellees, is as follows:

In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provisions of the act. The reasons given do not exclude them under the act. These reasons are proper subjects for the consideration of Congress, but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our government rests forbid the exercise of arbitrary power. Immigration officers must act within the

powers given. Courts have power to intervene where they exceed their authority.

*Ex parte Saraceno*, 182 Fed. 955.

*Lewis vs. Frick*, 189 Fed. 146.

*In re Feinkoff*, 47 Fed. 447.

*Ex Parte Koerna*, 176 Fed. 479.

*In re O'Sullivan*, 31 Fed. 448.

*United States vs. Martin*, 192 U. S. 1.

## THE RULE LAID DOWN BY THE SUPREME COURT.

In our opinion some of the decisions of the Federal courts on this subject have not clearly distinguished and accepted the rule laid down by the Supreme Court of the United States.

In *Ekiu vs. United States*, 35 L. Ed. 1146, 1150 (139-142 U. S. Sup. Ct. Rep. 1146), the Act of 1891 was under consideration. Section 1 of that act was in substance the same as ours; it provided that all idiots, insane persons, paupers or persons likely to become a public charge, etc., should be excluded. Under Section 1 a woman was detained on the ground that she was liable to become a public charge and therefore prohibited from landing, and she went into court and had a writ of habeas corpus



issued, and in considering whether she was entitled to it, the court, at page 1150, says:

“Section 7 of the Act of 1891 establishes the office of superintendent of immigration, and enacts that he ‘shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury.’ By Sec. 8 ‘the proper inspection officers’ are required to go on board any vessel bringing alien immigrants and to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing; and ‘shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record;’ ‘all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury’.”

And again the court says:

“The decision of the inspector of immigration being in conformity with the Act of 1891, there can be no doubt that it was final and conclusive against the petitioner’s right to land in the United States. The words of Section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant’s right to land, when once decided adversely by an inspector, acting within the juris-

diction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act. Section 13, by which the circuit courts and district courts of the United States are 'invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act,' evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under Sections 3 and 4, or indictments for misdemeanors under Sections 6, 8 and 10. Its intention was to vest concurrent jurisdiction of such cases in the circuit and district courts; and it is impossible to construe it as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers."

In *Lem Moon Sing vs. United States*, 39 L. Ed. 1082, the court, at page 1085, states the rule as follows:

"The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States; yet if the alien is entitled, of right, by some law or treaty, to enter this country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question for the decision of which the

courts may intervene upon a writ of habeas corpus.

That view, if sustained, would bring into the courts every case of an alien claiming the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the *class* entitled by some law or treaty to come into the country, or to a *class* forbidden to enter the United States. Under that interpretation of the Act of 1894 the provision that the decision of the appropriate immigration or custom officers should be *final*, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

Again in the case of *Chin Yow vs. United States*, 52 L. Ed. 369, Chief Justice Holmes uses the following language:

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the district court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would

not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

Again the court, at the top of page 2, states the rule correctly when he says that the jurisdiction of this court is limited to ascertaining whether the petitioners were denied a hearing:

"This court held in *In re Moola Sing*, 207 Fed. 780, that the jurisdiction of this court is limited to ascertaining whether the petitioners were denied a hearing, and if a hearing has been accorded, the court is precluded from a re-examination of the issue presented merely because it is contended that the conclusion of the immigration officers based upon the testimony was wrong."

Though in the *Moola Singh* case the court confined itself to a consideration of whether a hearing had been denied in the instant case, it seems to have examined the evidence and decided the case on its merits.

## REASON OF THE RULE.

### CONGRESS HAS EXCLUSIVE JURISDICTION.

It seems to us that the Federal courts have many of them entirely mistaken the decisions of our

Supreme Court, and this error is due to overlooking the reason of the rule. The question as to what immigrants shall be admitted or excluded in this country is an international question, over which the courts have no jurisdiction whatsoever, but by the Constitution and all of the fundamental laws of our country, this is a matter exclusively for the consideration of Congress. If Congress errs in its dealings with foreign powers there is no redress to the courts of our country, but only redress to Congress alone. In short, the dealings of a country with a foreign country are a matter exclusively within the political rather than the judicial power. If you grant that Congress has the exclusive power, it follows as the night follows the day that they can deputize this power to any agent they may select to execute it; if this agent exceeds his power, it is a matter for Congress to settle and not for the courts. It is as absurd to contend that the courts can say to an immigration officer, "You have exceeded your authority in excluding an alien," as it is to maintain that they can say that an ambassador or a consul has exceeded his authority and that therefore an aggrieved foreigner or foreign nation can appeal to the American courts to redress the grievance. The



only reason that the courts have the right to intervene when an executive exceeds the authority given to him by law, is because he violates some right guaranteed to a citizen or foreigner by either the Constitution or laws of the United States; and when our country is dealing with a foreign country, neither the Constitution nor any law of the United States is operative, and the courts have no authority in the premises whatsoever.

If these Russians were in Russia asking for admission to the United States and they were excluded, they could not appeal to the American courts to reverse the erroneous ruling of the immigration authorities because, though the act says that the following classes of aliens shall be excluded from admission, it does not say that if an alien does not belong to the excluded classes he shall have the right to enter, nor does the treaty with Russia have any such provision. If these Russians have a right to enter our country, which can be enforced by the courts because they do not belong to the excluded classes specified in Section 2, all of the Russians, and all of the French, and all other foreign nations have the same right.

In the dealings of a country with a foreign country the action of one branch of the government should be final, and should not be subject to review by the other branch. In such cases the courts and the Immigration Board are equal in authority, one cannot override the actions of the other, and this should be so, because executive officers are much better qualified in handling such matters to take into consideration questions of international law and expediency. Immigration officers could and would consider questions of this character — courts would never.

The above reasoning is adopted by the Supreme Court of the United States, as will be found in the case of

*Eikiu vs. United States*, 35 L. Ed. 1146, at page 1149,

where it says:

“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the

entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof.

The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs and to inspectors acting under their authority.

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. And Congress may, if it sees fit, as in the statutes in question in *United States vs. Jung Ah Lung*, authorize the courts

to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

This language is quoted with approval in the case of *Lem Moon Sing vs. United States* 39 L. Ed. 1082, at page 1084.

#### THE ACT ITSELF.

The Immigration Act of February 20, 1907, Section 24, says:

"Immigration officers shall have power to

administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and where such action may be necessary, to make a written record of such evidence."

Again, in Section 25, after stating how the board shall be made up, the act says:

"Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them."

Again, further down in the act, in the proviso clause, it says:

"That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

It will be observed that by this act the immigration board is not required to have a hearing. It has authority to determine whether the alien shall



land or be deported, and then it prescribes how all hearings shall be conducted.

The act says the board shall keep a complete permanent record "of all such testimony as *may be* produced," but does not say that such testimony must be taken. The courts have gone further than the law, even in saying that there must be a hearing, and they have made their most greivous mistakes in endeavoring to apply court rules of procedure to hearings of the Board of Immigration.

If Congress has given the board "authority to determine whether an alien who has been duly held shall be allowed to land, or shall be deported," and has not dictated how this authority shall be exercised, it is very difficult to understand what right a court has to dictate the method of the exercise of the authority, to attempt to force upon the board methods of procedure peculiar to courts alone. If Congress has given the board such authority, the board must have the right to determine what are the facts, as well as the meaning of the Immigration Law itself.

## APPLICATION OF RULE.

MEANING OF PERSON LIKELY TO BECOME PUBLIC  
CHARGE.

The question as to whether a person is likely to become a public charge is one involving many facts. It is impossible for the court under the act to say what matters are to be considered by the immigration authorities in determining this question, it may be the health of the immigrant, the mentality of the immigrant, or it may be the condition of the country. In passing on the question, such a broad range of reasons would enter into it that it is impossible for the court, under the act, to prescribe its limits. Congress left all these matters to the immigration authorities, because it assumed that such authorities would be more familiar than courts with local conditions and with the kinds of men who would be likely to become public charges.

A man might be likely to become a public charge at one time, who would not be at another. It is as logical to say that a man is likely to become a public charge because he has "insufficient money to maintain him during the winter," and because there are thousands of men of the same occupation as his

unemployed and because there is no work for him in the United States, as it is to say that he is likely to become a public charge because of some mental or physical defect which incapacitates him from coping with the conditions in our country; and the Immigration Board would be acting within its authority as much in one case as it would be in the other. Even if a jury had to determine this fact the court could not set aside the verdict because it took into consideration such matters. All the authorities say that the decision of the Immigration Board as to a question of fact is final, and the question whether or not a person is likely to become a public charge is a question of fact, and not one of mixed law and fact.

#### HOW THE RULE WAS APPLIED IN OTHER CASES.

It might throw some light on the subject to see how the rule has been applied by Federal Courts in other cases. Though some of them state the rule that there must be some testimony taken before the Immigration Board, yet they require very slight testimony to satisfy the rule.

In the case of *United States vs. Rodgers*, 191 Fed. 970, it was held that where an alien immigrant was before the Board of Inspectors, so that they had

an opportunity to inspect and examine him in person, and he was given a fair hearing and full opportunity to present evidence, an order denying him admission on the ground that he is likely to become a public charge cannot be reviewed by the courts in habeas corpus proceedings as not supported by evidence.

See also *United States vs. Williams*, 190 Fed. 897. The court in the *Rodgers* case, page 973, quotes with approval the following language used in the *Williams* case:

“Ever since the decision of the Supreme Court in *Nishimura Eikiu vs. United States*, 142 U. S. 651 (12 Sup. Ct. 336; 35 L. Ed. 1146), it has, so far as I know, been held in this circuit that if the Board of Inspectors had the alien before them so that they might themselves inspect and examine him, there was sufficient before them to warrant his exclusion on the ground that he was liable to become a public charge, if, in their discretion, they reached such a conclusion. Nothing which has been presented on this argument persuades me to reverse this holding.”

In an earlier case, namely *United States vs. Williams*, 186 Fed. 354, 356, the court followed the same rule. Thus it says:

“But the immigration acts confer exclu-

sive power upon the immigration officials to determine such questions, and the courts, so long as the procedure prescribed by the immigration acts and the rules established for their administration is substantially followed, have under the decisions of the United States Supreme Court no jurisdiction to interfere."

This latter was a very hard case, but the court had to leave it to the immigration authorities.

So if there must be a hearing, and all that is necessary to satisfy the rule is that the immigrant appear in person before the board, we have gone much further in fulfilling the requirements of the law than in most of the cases that have been considered by the courts.

It seems to us that the court, instead of merely determining whether the Immigration Board has exceeded its authority, has gone to the extent of reviewing its decision just as if it were one of a lower court.

Respectfully submitted,

CLAY ALLEN,

*United States Attorney.*

G. P. FISHBURNE,

*Assistant United States  
Attorney.*





IN THE  
United States Circuit Court  
of Appeals  
For the Ninth Circuit

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HENRY M. WHITE, Commissioner of Immigration at Seattle, Washington, for the United States (Respondent), <i>Appellant,</i>	} No. 2378.
<i>vs.</i> K. GREGORY, <i>et al</i> (Petitioners), <i>Appellees.</i>	

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In the matter of the application of K. Gregory, M.  
Aloshin, I. Riaboff, P. Neanlin, I. Emelin, L.  
Orloff, G. Yakimoff and P. Yakimoff for  
Writ of Habeas Corpus.

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Appeal from the United States District Court for  
the Western District of Washington.  
Northern Division.

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Brief of Appellees.

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## STATEMENT OF THE CASE.

The appellees filed in the District Court a petition for a writ of habeas corpus, alleging in substance as follows, to-wit:

1st. That they were detained at the United States Detention Station in the City of Seattle, by the United States Commissioner of Immigration, contrary to the statutes in such cases made and provided.

2nd. That they are white persons above the age of twenty-one years, in the enjoyment of good health, able bodied, and able to take care of themselves and duly supplied with money to meet all the requirements of the law of the United States, and that they are not contract laborers, and are not seeking entrance into the United States in pursuance of any contract for labor made with anyone.

3rd. That they are seeking to enter the United States of their free will and in good faith, intending to make the United States their permanent residence and fully intending to obey and comply with all the laws of the United States.

4th. That all of your petitioners were born in

Russia and that they have left Russia of their own free wills, and not by reason of having committed any offense against the laws of Russia, and that they are coming to this country hoping to better their condition under the beneficent laws of the United States.

5th. That they have paid their transportation to the United States with their own money.

6th. That your petitioners are not held by said Immigration Commissioner upon any final process issued by any court having jurisdiction, or held upon any process or order for contempt, of any court officer or body having authority to commit or hold them, nor upon any warrant issued by any court of this state, upon indictment or information, in this state, nor is there any lawful or valid reason for this detention.

7th. That your petitioners are held upon the alleged grounds as follow, to-wit:

1st. That there many Russians in the City of Seattle out of work.

2nd. That they might become a public burden; but your petitioners aver that they are able to secure

and save harmless the United States from any damage of any kind or nature whatsoever arising from the inability of your petitioners to support and take care of themselves, and that they are amply willing and able and intend to be good and self-supporting residents of the United States.

Wherefore petitioners pray for a writ of habeas corpus and for their discharge and general relief. Rec. pp. 3, 4 and 5.

The respondent, for a further and separate answer and affirmative defense sets up in substance the following:

That the Board decided to reject the aliens on the ground that they were persons who were likely to become a public charge, for the following reasons:

1st. Because they are common farm laborers, and there is not work for them in the United States.

2nd. Because they have but a limited amount of money, insufficient to maintain them during the winter.

3rd. Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of com-



mon labor is far in excess of demand.

4th. That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time.

For a fuller statement of the reasons for the exclusion of these aliens and their subsequent detention on this account until they return to their native country, we refer to the findings of the Board of Special Inquiry, set forth in full on the last pages of Exhibit "A" referred to above. Rec., pp. 12 and 14.

These are substantially the only grounds disclosed by this record upon which these aliens are detained, and constitute the only defense to the petition of appellees.

#### NO ACTUAL APPEAL WAS TAKEN.

It does not appear from the record that a transcript of the proceedings was ever before the United States Department of Commerce and Labor for examination and review. The alleged appeal consists of an exchange of telegrams, which amount to nothing, and with which the petitioners has nothing to do, and of course their rights under the law were

not thereby affected. Rec., p. 14.

## MOTION TO DISCHARGE PETITIONERS.

Upon the coming in of the return of the respondent the petitioners move as follows, to-wit:

Come now the said petitioners and move that they and each of them be discharged forthwith on the following grounds, to-wit:

1st. The return of the Immigration Commissioners shows that the said petitioners are detained and restrained of their liberty for unlawful reasons, and contrary to the statutes in such case made and provided.

2nd. That the special examining board, and the said commissioner, and the said secretary of commerce and labor, exceeded their authority and their jurisdiction, and their alleged proceedings and decision are null and void.

3rd. That the alleged reasons for detaining said petitioners are irrelevant, immaterial, and not supported by evidence, and are frivolous and sham.

4th. That said petitioners have all the personal qualifications required by the statutes to entitle them to immediate and unconditional discharge.

Upon the hearing this motion was granted. As its decision is very concise, we set it out in full. It is in words and figures as follows:

K. Gregory and seven others filed a petition praying a writ of habeas corpus, alleging that they are in good faith seeking admission into the United States, to make the United States their permanent home; that they do not come within any of the classes prohibited admission. A show cause order was issued and the Commissioner of Immigration made return, setting forth, in substance, that the petitioners sought admission and were held for special inquiry by the immigrant inspector and a board of special inquiry was organized as provided by law, and:

“That on December 23, 1913, after a full hearing (a duplicate report of which appears in the immigration files of this cause and is marked ‘Exhibit A’ and made a part of this return), the Board decided to reject the aliens on the ground that they were persons who were likely to become a public charge, for the following reasons:

1st. Because they are common or farm laborers, and there is no work for them in the United States.

2nd. Because they have but a limited amount of money, insufficient to maintain them during the winter.

3rd. Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of demand.

4th. That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time."

That the petitioners appealed to the secretary of Labor, who affirmed the decision of the board of special inquiry.

The petitioners move that they be forthwith discharged for the reasons:

"(1) That the return shows that they are detained and restrained of their liberty for unlawful reasons and contrary to the statutes in such cases made and provided; (2) that the special examining board and the secretary of commerce and labor and said commissioner exceeded their authority and jurisdiction; (3) that the alleged reasons for detaining said petitioners are irrelevant, immaterial and not supported by evidence, and are frivolous and sham; (4) that said petitioners had all the personal qualifications required of them by the statutes, and to entitle them to immediate and unconditional discharge."

This court held *In re Moola Singh*, 207 Fed. 780, that the jurisdiction of this court is limited to ascertaining whether the petitioners were denied a

hearing, and if a hearing has been accorded, the court is precluded from a re-examination of the issue presented merely because it is contended that the conclusion of the immigration officers based upon the testimony was wrong. In the *Moola Singh* case a trial was had, and the conclusion of the examining board was that the aliens be excluded from admission under the laws of the United States. The conclusion of the board found no delinquency in the personal qualifications of the applicants which brought them within the exclusion provisions of the act. This court cannot examine into the testimony produced upon the hearing in this case before the special examining board, nor enter upon a re-examination of the facts. This court is bound by the facts as found by the board of special inquiry. Do the facts as found bring the petitioners within the provisions of the exclusion provisions of the act? Are the petitioners qualified to enter, under the findings of the board, and is the act of the board beyond its jurisdiction, and does the personal condition of the applicants, as found, preclude their exclusion?

Section 1 of the Immigration Act, of February 20, 1907, reads:



“That there shall be levied, collected and paid a tax of four dollars for every alien entering the United States.”

Section 2 of the Act provides who are to be excluded, among whom are “persons likely to become a public charge.” Section 10 of the Act provides:

“That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 2 of this Act.”

Section 24 of the Act provides:

“\* \* \* Immigration officers shall have power to administer oaths, and to take and consider evidence touching the right of any alien to enter the United States, and where such action is necessary, to make a written record of such evidence.

A provision for the punishment of any person who shall knowingly or wilfully give false oaths or swear to any false statement is made, and it is also provided that the decision of such officer in admitting an alien shall be subject to challenge by any other officer, and such challenge shall operate to take the alien whose right to land is challenged before a

board of special inquiry for its investigation. It is further provided:

“Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.”

“Sec. 25. \* \* \* All hearings before boards shall be separate and apart from the public \* \* \* and the decision of any two of the board shall prevail; but either the alien or any dissenting member of said board may appeal \* \* \* to the secretary of labor \* \* \* that in *every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of labor.*”

Under Section 2, an alien “likely to become a public charge” is excluded; and under Sec. 25, the decision of the board of special inquiry is final where the alien is by law excluded. The findings and conclusions of the board with relation to the petitioners, however, eliminate all physical and mental deficiencies legislated against. Shall it be said, under such a record, that the examining board can exclude an alien upon the conclusion that he is “likely to become a public charge,” when, upon the facts found

and reasons given, the applicant is not brought within the provisions of the act excluding him from admission?

In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provisions of the act. The reasons given do not exclude them under the act. These reasons are proper subjects for the consideration of Congress, but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our government rests forbid the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority.

*Ex parte Saraceno*, 182 Fed. 955;

*Lewis vs. Frick*, 189 Fed. 146;

*In re Feinkoff*, 47 Fed. 447;

*Ex parte Koerna*, 176 Fed. 479;

*In re O'Sullivan*, 31 Fed. 447;

*United States vs. Martin*, 192 U. S. 1.

The petitioners are discharged; but, if within ten days after the filing of this decision, the respondent appeals, the petitioners must give recognizance with sufficient surety in the sum of \$250 each, conditioned to appear and answer the judgment of the appellate court in accordance with Supreme Court Rule 34.

### ASSIGNMENTS OF ERROR.

Respondent's assignments of error are exceedingly numerous. Rec., pp. 53, 54, 55, 56 and 57.

They may be condensed and considered together. They are in substance as follows, to-wit:

The court erred in taking jurisdiction and reviewing the acts of statutory officials.

The learned counsel for appellants assume as the ground of their contention that such officials are above and beyond the reach of the law, and that when they exceed their authority, and their acts become lawless, wrongful and arbitrary, the courts have no jurisdiction to interfere and review their conduct. This is claiming for such officials supreme and despotic power, which does not exist in the United States, and cannot be lawfully exercised at

all. Congress has only restricted power, and the same is true of all the agents of the government. In all cases where the constitution and the laws of the land are violated the courts have jurisdiction, and any act of Congress (if there should be any such) depriving the courts of such jurisdiction would be unconstitutional and void.

### A STATUTORY QUESTION ONLY.

Congress has enacted certain statutes, prescribing certain conditions upon which immigrants may enter this country. In this case no treaty is involved, but only the statute, and we are to look to the statute in determining the rights of these aliens. If they have all of the qualifications prescribed by law and none of the impediments which would place them in any of the excluded classes they should be permitted to enter this country unconditionally, and without delay, and without imposing on them any unusual and unnecessary hardship.

Rule 6, Department of Commerce and Labor, relating to the admission or exclusion of Immigrants.

*Fong Yue Ting vs. U. S.*, 147 U. S. 698.



It is an undisputed fact, as shown by this record, that the appellees have all personal qualifications required by law to entitle them to unconditional admission to this country, and none of the defects that would exclude them. This was so held by the court (Rec., p. 49), and the decision of the board of inquiry was not based on any lawful grounds (Rec., p. 13), and an examination of the testimony shows that there is no lawful grounds for excluding them (Rec., pp. 18 to 41), but, on the contrary, this record establishes their right to unconditional entry, and if they can be excluded all immigrants may be excluded and the immigration laws nullified and suspended by the arbitrary action of the immigration officers, and Congress ousted of its jurisdiction to legislate in respect to immigration.

### THE STATUTE.

The Immigration Act of February 20, 1907, is in part as follows:

*“Sec. 10. That the decision of the board of special inquiry herein provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens afflicted with tuberculosis, or with a loathsome or dangerous contagious disease, or with any mental or physical disability*

*which would bring such aliens within any of the classes excluded from admission to the United States under this Act."*

This statute does not apply to the appellees, because they are not within the excluded classes.

### EXPERT KNOWLEDGE.

The reason the certificate of the medical examiner is made conclusive as to the infirmities that would bring the aliens within the excluded class is obvious. *The certificate is based upon expert knowledge.* It is not conclusive as to anything else. The conclusiveness of the medical certificate makes the decision of the board of inquiry conclusive as to disabilities only *when based upon the certificate.* But when it is not based upon the medical certificate it is not conclusive as to anything.

The language of the statute is so plain that it is surprising that its true meaning should be mistaken by learned counsel.

### AUTHORITY OF BOARD OF INQUIRY.

Whatever authority the commissioner or the examining board has is conferred by the statute, and is confined within the statute. When they go out-

side of the letter of the law they are outside of their authority and in the realm of the lawless, and all their acts are wrongful and arbitrary and necessarily within the jurisdiction of the courts. Otherwise there would be wrongs without remedy, contrary to the law of the land.

It is the first duty of the courts to enforce the constitution and the supreme law of the land, and of course an official is not exempt. If he exceeds his authority his acts have no validity, and he is answerable as an individual. This is what the immigration officers have done in the case at bar. They are seeking to exclude the appellees upon grounds not prescribed by the statute, over which they have no jurisdiction, and which does not concern them in their official capacity.

*If not excluded by the statute they cannot be excluded at all.*

*In re Kormehl*, 87 Fed. 314.

*Ekill vs. U. S.*, 142 U. S. 651.

2 *Cyc.*, 120 and 121.

*In re Monoco*, 86 Fed. 117.

*In re Gottfried*, 89 Fed. 9.

*Rules 9 and 20, Lawe and Regulations Relating to Immigrants.*

21 *Cyc.*, 292-3-6.

*U. S. vs. Jung Ah Lung*, 124 U. S. 621.

*McClaghry vs. Deming*, 186 U. S. 49.

The reasons specified for the exclusion of the appellants are not specified in the statute nor based upon expert knowledge. They are so absurd and unreasonable that we again call the attention of this honorable court to them. They as follows, to-wit:

“First. Because they are common farm laborers and there is no work in the United States for them.

Second: Because they have a limited amount of money, insufficient to maintain them through the winter.

Third. Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of demand.

Fourth: That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time.” *Rec.*, p. 13.

None of these alleged reasons are within the statutes. None of them are relevant or material.

None of them are based upon the evidence within the record. None of them are proper subjects of inquiry by the board of immigration. They are all unwarranted assumptions, frivolous and sham, and so far as this record is concerned they are untrue. Nothing can be conceived of that is more absurd and foolish. As well say that they should be excluded because there is war in Mexico, or because of any other irrelevant matter.

The first cause, "that they are farm laborers and that there is no work for them in the United States," is at variance with what everybody knows and what is a matter of common knowledge, of which this honorable court will take judicial notice to-wit, "that there is a scarcity of farm laborers in the United States." But the fourth cause is most unique, to-wit: "That alien laborers should not be permitted to enter the United States at this time," and thereupon and in pursuance thereof the immigration officers suspend the law of Congress.

The other alleged grounds for excluding the appellees speak for themselves and further comment is unnecessary.

It is obvious that the intent of the statute is to



make the findings of the Board of Inquiry, based upon the facts contained in the medical examination certificate, final as to the facts only, but not as to the law flowing from such facts. The law is a judicial question, always, and is the logical sequence from the facts, just as the verdict of a jury must control the judgment of the court. So the facts must govern the right of appellees. The vital issues in the case at bar—whether the appellees have all the personal qualifications, which would entitle them to unconditional entry into this country, and none of the disabilities which would bring them into any of the excluded classes. Such being the case, the law is with them. I quote from the opinion of the court below:

“In the findings made there is no disqualification personal to the applicants, nor any objections made because of inability to conform to new conditions and relations. They are not excluded by the provisions of the act.” Rec., pp. 49 and 50.

This finding of the court is supported by the record and is conclusive and controls the judgment like the verdict of a jury. This finding of the court is not assailed in any way, nor assigned as error. See assignments of error, Rec., pp. 54, 55 and 56.

## ARBITRARY POWER.

It is elementary that officials under the law must keep within the law. They have no power whatsoever not granted by the law, and when they exceed their authority their acts become arbitrary and lawless. Any Act of Congress conveying arbitrary power upon the Board of Inquiry, or upon any body would be unconstitutional and void. Arbitrary power cannot be lawfully exercised within the United States.

Justice Matthews, late of the Supreme Court of the United States, said:

“Any act of the legislature conferring arbitrary power is void.”

“The laws and principles upon which our government rests forbid the exercise of arbitrary power.”

“Acts conferring arbitrary power do not belong to the domain of law, and are always inoperative and void.”

*Yick Wo vs. Hopkins*, 118 U. S. 356.

If there are no lawful grounds for excluding these appellees, the examining board has no power to exclude them at all. The officials are bound by the statute, and cannot nullify or suspend the statutes.

If such things are permitted our government ceases to be a government of law, and becomes a government of men.

## RETURN OF RESPONDENTS.

We again call the attention of this Honorable Court to the return. It speaks for itself. It is quite peculiar. It is maladministration *per se*. There is no claim that its officials have acted according to the statute in such cases made and provided. It contains among other things the averment that "*alien laborers should not be permitted to enter the United States at the present time,*" and upon this novel and unwarranted proposition they base their official decision.

From this it follows as a logical sequence that if these appellees can be excluded, all immigrants may be excluded, at the arbitrary whim and caprice of the immigration officers, regardless of the law.

## OFFICERS MUST ACT WITHIN THE LAW.

The case at bar is analogous to the case of a sheriff or a marshal, or any other representative of the law. None of them can do anything outside of their authority. An execution against A. would not

warrant the robbery of B., and a court might have jurisdiction to render a judgment against C. but not against other people, who are not liable in the same manner as C., and in like manner the Board of Inquiry could have jurisdiction to exclude those within the excluded classes, but could have no jurisdiction to exclude those who were not within the excluded classes and who have a right to entry into the United States. The facts in all cases determine the jurisdiction and the judgment. There must be

#### NO VARIANCE BETWEEN THE EVIDENCE AND THE JUDGMENT.

In the case at bar the evidence shows affirmatively that the appellees are not within the excluded classes, and that they have a right to unconditional entry into the United States, The Act does not apply to them, and any judgment adverse to them would be at variance with the evidence, and the Act excluding certain immigrants does not apply to them, unless the Act excludes all immigrants.

#### SPECIAL TRIBUNAL MAY BE REVIEWED.

1. When order of deportation is not confined to the excluded classes, and when the evidence does

not sustain the findings of the Board.

2. When there are errors of law.

3. When the order is contrary to the evidence.

4. When the person sought to be deported is not within the inhibition of the statute.

5. When the special tribunal has exceeded its authority; and

6. When the deportation is sought upon grounds not prescribed by the statute.

*Ex Parte Saraceno*, 182 Fed. 955.

*Lewis vs. Frick*, 189 Fed. 146.

*In re Feinkoff*, 47 Fed. 447.

*Ex Parte Koerner*, 176 Fed. 478.

*In re O'Sullivan*, 31 Fed. 447.

All cited by the court, *supra*, and all in point as above indicated.

The learned counsel for appellant contends that the admission of immigrants is an international question, with which courts have nothing to do, but the answer is, Congress has legislated, with respect to immigrants, and has prescribed terms and conditions upon which aliens may be admitted, and when an alien makes application for admission he does so



under the statute, and thereby becomes, by operation of law, entitled to all the rights conferred by the statute, and the courts have taken and do take jurisdiction as a matter of course to enforce the rights of the applicants under the statute.

An examination of the authorities cited by appellants, counsel will show that so far as they are in point, they sustain the contention of the appellees. They all forbid anarchy, lawlessness and uncontrolled action of statutory officials and the deportation of any alien except in pursuance of law. They all discriminate between the arbitrary and vicious acts of statutory officials and the just and humane processes of the law based upon natural justice and the practice of the courts.

### ALWAYS IN OPERATION.

The constitution and laws of the land are always in operation. They cannot be suspended. Neither the government, nor Congress, nor the courts, nor any agency of the government can suspend the laws of the land for an instant. The law is always in operation for the protection of all persons within the jurisdiction of the United States, includ-

ing aliens who have applied for admission, and not excluded by law. It is the imperative duty of this court to enforce the law and protect the rights of everybody, including aliens who are applicants for admission. The rights of such aliens are just as sacred as the rights of others, and their exclusion, except as provided by law, would be a great and irreparable wrong.

Respectfully submitted,

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